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No. 93-1911-CFX
Status: GRANTED

Title: Cinda Sandin, Unit Team Manager, Halawa Correctional Facility, Petitioner
v.
Demont R. D. Conner, et al.

Docketed:
May 26, 1994

Court: United States Court of Appeals for
the Ninth Circuit

Counsel for petitioner: Michaels, Steven S.

Counsel for respondent: Hoffman, Paul L.

NOTE: See mail label re dkt dt SEE 94-43.

Entry	Date	Note	Proceedings and Orders
1	May 26 1994	G	Petition for writ of certiorari filed.
2	Jun 29 1994		DISTRIBUTED. September 26, 1994 (Page 25)
3	Sep 8 1994	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Sep 8 1994	X	Brief of respondent in opposition filed.
7	Oct 3 1994		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Oct 3 1994		REDISTRIBUTED. October 7, 1994 (Page 26)
9	Oct 7 1994		Petition GRANTED. limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, November 16, 1994. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 13, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, December 29, 1994. Rule 29.2 does not apply. *****
10	Nov 14 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
11	Nov 14 1994		Record filed.
		*	Original record proceedings United States District Court for the District of Hawaii (BOX)
16	Nov 15 1994		Brief amicus curiae of Criminal Justice Legal Foundation filed.
12	Nov 16 1994		Joint appendix filed.
14	Nov 16 1994		Joint appendix in two volumes.
15	Nov 16 1994		Brief of petitioner Cinda Sandin filed.
17	Nov 16 1994		Brief amici curiae of New Hampshire, et al. filed.
19	Nov 28 1994		Order extending time to file brief of respondent on the merits until December 20, 1994. (Brief to be filed and served on all counsel by 3 p.m.
20	Nov 28 1994		LODGING of three volumes of state prison regulations submitted by counsel for the petitioner.
21	Dec 19 1994		
22	Dec 20 1994		Brief amicus curiae of Edwin F. Mandel Legal Aid Clinic filed.
23	Dec 20 1994		Brief amici curiae of American Civil Liberties Union, et al.

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			filed.
26	Dec 20 1994	X Brief of respondent DeMont R. D.Conner	filed.
24	Dec 21 1994		SET FOR ARGUMENT TUESDAY, FEBRUARY 28, 1995. (2ND CASE).
25	Dec 21 1994		CIRCULATED.
27	Jan 5 1995	X Reply brief of petitioner	filed.
28	Feb 28 1995		ARGUED.

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No. **931911** MAY 26 1994

OFFICE OF THE CLERK

**In The
Supreme Court of the United States
October Term, 1993**

CINDA SANDIN, Unit Team Manager,
Halawa Correctional Facility,
Petitioner,
vs.

DEMONT R.D. CONNER, *et al.*,
Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a maximum security state prison inmate who is not subject to a loss of good time credit, nor to any necessary impact on parole, but who "may be" subjected to disciplinary segregation for violation of prison rules, has a "liberty interest" in avoiding disciplinary segregation solely because state prison disciplinary rules require a disciplinary committee to find "substantial evidence" of a rule infraction before deciding whether and to what extent to order the inmate segregated?

2. Whether, assuming, *arguendo*, state prison rules create a "liberty interest" in avoiding disciplinary segregation, an inmate who has confessed to facts which establish misconduct is entitled, by reason of the Due Process Clause of the Fourteenth Amendment, to call witnesses at his prison disciplinary hearing?

3. Whether in light of the uncertainty created by this Court's precedents regarding the creation of "liberty interests" in the prison setting, and in light of the uncertainty in the law bearing on prisoners' rights to call witnesses at prison disciplinary hearings, the Ninth Circuit erred in reversing the judgment of the District Court and in stripping Petitioner of her qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and its progeny, or, alternatively, whether the Court should grant the writ, vacate the judgment, and remand in light of *Elder v. Holloway*, 114 S. Ct. 1019 (U.S. Feb. 23, 1994)?

PARTIES TO THE PROCEEDING

Petitioner Cinda Sandin was, at the times relevant to this proceeding, a Unit Team Manager at Halawa Correctional Facility, Department of Corrections, State of Hawaii. She appears in this Court in her official and individual capacities. Petitioner was one of sixteen state prison officials sued by Respondent Demont R.D. Conner in the amended complaint in the District Court in Civil No. 88-0169 (D. Haw. am. comp. filed Sept. 8, 1989). She is the only official left in the litigation with respect to Respondent Conner's procedural due process claim in connection with an August 28, 1987, disciplinary hearing. See Pet. App. A8-A9. Ms. Sandin is the only Petitioner.

Respondents include Demont R.D. Conner, who at all times was and is serving a thirty-years-to-life prison sentence in the Hawaii state penal system. Other Respondents are Theodore Sakai, Acting Administrator, Department of Corrections; Harold Falk, Director of Corrections, and various employees of Halawa Correctional Facility, *i.e.*, Lawrence Shohet, Corrections Supervisor, William Oku, Administrator, Leonard Gonsalves, Chief of Security, Francis Sequeira, Unit Team Manager, and Adult Corrections Officers William Summers, Robert Johnson, Gordon Furtado, Abraham Lota, Edward Marshall, William Paaga, and Brian Lee, all of whom were Defendants below. Also named as a Defendant below, and as a Respondent here, is Dr. Kim Thorburn, a medical officer with responsibility for Halawa facility. Also a Defendant below and a Respondent here is the State of Hawaii. The

PARTIES TO THE PROCEEDING - Continued

State and each of the officer respondents have an interest in the outcome of (and support) Ms. Sandin's petition, and are named as nominal respondents only pursuant to S. Ct. R. 12.4. All of the officer respondents are named, as below, in their official and their individual capacities.

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CINDA SANDIN, Unit Team Manager,
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vs.

DEMONT R.D. CONNER, *et al.*,

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**
—◆—

PETITION FOR WRIT OF CERTIORARI
—◆—

Petitioner Cinda Sandin, Unit Team Manager, Halawa Correctional Facility, in her official and individual capacities, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 2, 1993, as amended by the opinion and judgment entered February 2, 1994.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit entered February 2, 1994, is reported at 15 F.3d 1463 (9th Cir. 1994), and is reprinted in Appendix ("App.") "A," *infra*. The order of the Court of Appeals, filed February 25, 1994, denying Petitioner's petition for rehearing, is unreported and is printed in App. "E." The initial opinion of the Court of Appeals, entered June 2, 1993, is reported at 994 F.2d 1408 (9th Cir. 1993). The order and judgment of the District Court from which appeal was taken by Respondent Conner are unreported and are printed at Apps. "C," and "D," *infra*.

JURISDICTION

The original opinion of the United States Court of Appeals for the Ninth Circuit was entered June 2, 1993, *see* Pet. App. A1, and a timely petition for rehearing and suggestion of the appropriateness of rehearing *en banc* was filed June 16, 1993. On February 2, 1994, the Ninth Circuit issued an amended opinion, but did not dispose of the petition for rehearing. *Id.* On February 25, 1994, the Court of Appeals denied the petition for rehearing and rejected the suggestion for *en banc* review. *See* App. "E." The time in which this Petition may be filed therefore extends to and includes May 26, 1994, and this Petition is timely. Jurisdiction is invoked here under 28 U.S.C. § 1254(1).

Jurisdiction in the United States District Court for the District of Hawaii was alleged to have been conferred by 28 U.S.C. § 1343(3). Jurisdiction to review the final judgment

entered in the District Court in favor of all Defendants lay in the United States Court of Appeals pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL AND ADMINISTRATIVE PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides in relevant part that:

[No State shall] deprive any person of life, liberty, or property, without due process of law.

Subchapter 2, Title 17, of the Hawaii Administrative Rules, and which governed the adjustment process at Halawa Correctional Facility at all times relevant to this litigation, has been reprinted in its entirety in App. "F," *infra*, Pet. App. A41 *et seq.*

STATEMENT OF THE CASE

In *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), this Court held that a prison's rules that permitted, but did not mandate, denial of visitation privileges under certain circumstances did not create a "liberty interest" in receiving visitors. *Id.* at 464. In response to the request of thirty-one States' Attorneys General, the Court found it was unnecessary to create a "bright line" rule "that prison regulations, regardless of the mandatory character of their language or the extent to which they limit official discretion, 'do not create an entitlement

protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement.' " *Id.* at 461 n.3. "Inasmuch as a 'bright line' of this kind [was] not necessary for a ruling in favor of petitioners," the Court "refrain[ed] from considering it at this time," "express[ing] no view on the proposal and leav[ing] its resolution for another day." *Id.* at 462 n.3.

This case concerns not the due process implications of visitation with those *outside* the prison, who are presumed to be innocent, but the ability of prison officials to segregate inmates within the prison for violation of disciplinary rules. In this context, where the need to be free of intrusive federal review is at its height, the Ninth Circuit has held that Hawaii prison rules create a "liberty interest" in avoiding "disciplinary segregation" without more. Hawaii does not grant "good time" credits, and even the most serious disciplinary finding has no necessary impact upon parole. The main issue in this case is whether Hawaii's prison rules, which authorize, but do not require, the imposition of disciplinary segregation, create a federally protected "liberty interest" solely because those rules require, as a matter of state law, "substantial evidence" of misconduct before an official exercises the discretion to order, or not order, an inmate to a period of segregation. A second issue is whether an inmate who has confessed to facts that constitute misconduct is nonetheless entitled, as a matter of federal Due Process requirements, to call witnesses to his prison disciplinary hearing. A third issue is whether the prison official who failed to ensure the availability of witnesses for the

accused inmate should have been stripped by the Ninth Circuit of her qualified immunity from federal suit.

1. Inmate Demont R.D. Conner is a Hawaii state prisoner serving a thirty-years-to-life sentence for attempted murder, robbery, kidnapping, burglary, and rape. Pet. App. A2, Clerk's Record 83 (Exh. "A"). Conner, at the times relevant to this Petition, was housed at Halawa Correctional Facility, the only maximum security correctional facility in the Hawaii penal system. By law, Halawa is charged with providing "extensive control and correctional programs for categories of persons who cannot be held or treated in other correctional facilities," including "[i]ndividuals committed because of serious predatory or violent crimes against the person"; "intractable recidivists"; "[p]ersons characterized by varying degrees of personality disorders"; "[r]ecidivists identified with organized crime"; and "[v]iolent and dangerously deviant persons." Haw. Rev. Stat. § 353-7(b)(1) (1985 & Supp. 1992). At the times relevant here, Halawa facility inmates were governed by a disciplinary system that consisted of Hawaii's general criminal laws and an "adjustment process" administered by the prison itself. See App. "F," *infra*.

2. Under the "adjustment process," prison administrators have defined a variety of "prohibited acts," categorizing them as to their severity. "Misconduct" is categorized as "greatest misconduct," "high misconduct," "moderate misconduct," "low moderate misconduct," and "minor misconduct." Pet. App. A43, A45, A47, A49, A51. The maximum punishment for the most serious "misconduct" is "[d]isciplinary segregation up to sixty days," or "[a]ny other sanction other than disciplinary

segregation." Haw. Admin. R. § 17-201-6(b), Pet. App. A45. The "other sanctions" to which the administrative rule refers includes loss of privileges, such as access to non-legal mail or the commissary, but do not include any sanction that lengthen's inmate's term of incarceration. Hawaii does not employ any system of "good time" credits, and the Hawaii State Paroling Authority is free to ignore a record of misconduct in granting parole. See Haw. Rev. Stat. §§ 353-68, 353-69 (1985). Parole may be granted "at any time after the prisoner has served the minimum term of imprisonment fixed according to law," *id.* § 353-68, and so long as "it appears to the Hawaii paroling authority that there is a reasonable probability that the prisoner concerned will live and remain at liberty without violating the law and that the prisoner's release is not incompatible with the welfare and safety of society," *id.* at 353-69. In the event an inmate is accused of a "serious rule violation," see Pet. App. A52, the prison convenes an "adjustment committee," which, in relevant respect, is required to make "[a] finding of guilt," only "where: (1) The inmate or ward admits the violation or pleads guilty" or "(2) the charge is supported by substantial evidence." Haw. Admin. R. § 17-201-18(b), Pet. App. A57-A58. After a finding of guilt, "[t]he adjustment committee may render sanctions commensurate with the gravity of the rule and the severity of the violation," *id.* § 17-201-19, Pet. App. A58. The committee need not impose any sanctions upon the prisoner.

3. On August 13, 1987, Respondent Conner was charged with a variety of misconducts based upon the following report of Adult Corrections Officer Gordon Furtado:

On Thu. Aug. 13, 1987 at approx. 0900 hrs. I ACO G. FURTADO while on duty in Module A along with ACO R. AHUNA escorted INMATE D. CONNER from his cell (quad II) to the module program area. At this time I informed Inmate CONNER to move against the wall to be strip-searched before leaving the module. Inmate CONNER then stripped, faced the wall and squatted. I then asked Inmate CONNER to put both hands on the wall and lift up both feet one at a time to which he did with no incident.

I then asked him to step back, bend over and with both hands spread his buttocks so that I could check for contraband in the rectal area to which he said "Fuck!" in an angry tone of voice. This part of the search was thus completed, but as Inmate CONNER turned around and faced this writer he stared at me and stated "Why are you harassing me?" I informed him that I'm just following a routine procedure. He then stated in a very sarcastic voice "What you got something personal against me! Why you harassing me?" I then told him all you have to do is just listen and follow what I tell you to do but Inmate CONNER just kept on making sarcastic remarks about being harassed and the way that this writer was doing his job.

At this time because of the tense atmosphere and also the very provoking attitude towards this writer, Sgt. SUMMERS who witnessed this incident canceled Inmate CONNER's privilege of religious counselling. Inmate CONNER was then escorted back to his cell by this writer and ACO D. COELHO.

It should be noted that as Inmate CONNER went through the strip search procedures he

moved very slow and questioned every move as if trying to hinder the search, hoping that this writer might overlook a certain area. Inmate CONNER appeared to be very unruly in his attitude toward this writer.

Clerk's Record 83; Exh. "K"; Pet. App. A61-A62. Conner was given notice of the charges, and the opportunity to contest them before an adjustment committee. The Committee concluded that Conner had "use[d] physical interference or obstacle resulting in the obstruction, hindrance, or impairment of the performance of a correctional function by a public servant" (a high misconduct); "us[ed] abusive or obscene language to a staff member"; and engaged in "[h]arassment of employees" (the latter both low-moderate misconducts). Pet. App. A66. The Committee, in its August 31, 1987, disposition of the charges, gave the following as its contemporary statement for its decision:

The Committee based their decision upon the inmate's statements that during the strip search procedure he turned around after squatting and looked at the ACO. He was then directed to "spread his cheeks" by ACO Furtado as part of the new strip search procedure. He felt angry, humiliated and apprehensive. He then "eyed up" ACO Furtado and was hesitant to comply. He further indicated that he dislikes ACO Furtado and feels he should not work on the module. The inmate admitted saying the word "fuck" during the procedure. The Committee also reviewed the submitted reports. Witnesses were unavailable due to move to the medium facility and being short staffed on the modules.

Clerk's Record 83; Exh. "K"; Pet. App. A66. Although Conner's "high misconduct" was ultimately expunged as a result of an internal prison review, Conner filed a federal lawsuit in the United States District Court for the District of Hawaii against Petitioner, who served as Chairman of the adjustment committee, and other officials, alleging a variety of defects in the adjustment committee process, including the allegedly improper denial of witnesses. After over three years of litigation, the District Court granted summary judgment to Defendants. See App. "C."

4. The Ninth Circuit, in a published opinion by Judge Reinhardt, joined by Judges Browning and Norris, reversed and remanded in part. Pet. App. "A." In relevant provision,¹ the panel concluded that "Conner had a liberty interest, protected by the fourteenth amendment,

¹ In a portion of the decision not challenged by this Petition, the Ninth Circuit struck down, on procedural grounds, the application of a prison rule barring communication in a language other than English to what inmates asserted was Islamic prayer. See Pet. App. A9-A12. Because the Ninth Circuit did not forbid the prison to proscribe acts susceptible of communicative effects in languages other than English, see *id.* at A11 n.9, left open the issue of qualified immunity, *id.* at A12, and affirmed the grant of qualified immunity in related cases, see *Smith v. Elkins*, No. 93-1585 (9th Cir. Mar. 2, 1994), and State officials have repealed the rule at issue on the "Islamic prayer" claim, certiorari is not sought as to the specific issues implicated by the Court's ruling pertaining to Conner's alleged claim "that his first and fourteenth amendment rights were violated when prison officials punished him for praying aloud in Arabic." See Pet. App. A9. This Petition, rather, concerns the Court's reversal of "summary judgment as to Conner's claim regarding disciplinary segregation." *Id.*; see also *id.* at A18-19.

in not being arbitrarily placed in disciplinary segregation." *Id.* at A3. To reach this conclusion, the panel relied entirely upon the "substantial evidence" provision of the prison rules. The Court found the rule that mandates "freedom from disciplinary segregation" if "the inmate does not admit guilt," and "the committee does not find substantial evidence," to "provide explicit standards that fetter official discretion." *Id.* at A4. Then, "[h]aving found that Conner possessed a liberty interest in not being confined to disciplinary segregation," the panel found, despite Conner's own incriminating statements, that Petitioner had not sufficiently demonstrated "the adequacy of its justification for denying an inmate the right to present witnesses." *Id.* at A8. The Court reversed the summary judgment, even as to claims for monetary relief against Petitioner, stating that "[t]he right to call witnesses at a disciplinary hearing has been clearly established since *Wolff v. McDonnell*[, 418 U.S. 539 (1974),] was decided in 1974." *Id.* at A9. Although the Court, on a timely petition for rehearing, reinstated summary judgment for Defendants on other claims, it ultimately let the foregoing rulings stand.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit panel's decision in this case overturning summary judgment as it pertains to Conner's challenge to the 1987 misconduct hearing threatens an undue – and unprecedented – expansion of federal judicial review of prison management decisions, and an equally disturbing constriction of the doctrine of qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800

(1982). In the circumstances of this case, the exacting federal review directed by the Ninth Circuit does not – and cannot – serve to restore "good time" credits, or compel or even necessarily affect, parole. Such review does not rid Hawaii's prisons of unsafe environmental conditions, or deter violence against inmates, either from errant correctional officers, or from other inmates; nor does it serve to protect the important but limited First Amendment rights inmates enjoy despite their incarcerated status. Nor does it even protect state inmates from irrational and arbitrary assignments to disciplinary segregation. After all, even without procedural Due Process protections, inmates would be entitled under the Equal Protection Clause to treatment that meets minimum rationality.

Instead, without reason or precedent to back it, the Ninth Circuit has simply made *every* disciplinary proceeding a basis for intrusive federal review, and for extensive litigation of personal-capacity damage claims, regardless of the limited effect of the discipline measures at issue, and without heed to the most pertinent fact: a *confession* of inmate misconduct.

This Court should grant review, if for no other reason than to protect *inmates* from the adverse consequences of the decision below. For under that decision, prison administrators have far diminished incentive to formulate disciplinary systems containing standards of proof, for no matter how minimal the time in segregation, and no matter how great the discretion to impose no penalty at all, the mere announcement of a standard of proof thereby hog-ties prison administrators with the full-blown requirements imposed upon prison disciplinary

decisions that do have a necessary impact on the length or very nature of confinement. For these reasons, and because the decision below conflicts with the decisions of this Court and of the other courts of appeals, the Court should grant the petition for certiorari. Because the Ninth Circuit did not have the benefit of this Court's decision in *Elder v. Holloway*, 114 S. Ct. 1019 (U.S. Feb. 23, 1994), the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of the *Elder* decision.

I. This Court Should Grant Review, Because The Ninth Circuit's Reading Of The Requirements For A State-Created "Liberty Interest" In The Prison Setting Is In Direct Conflict With This Court's Precedents And With Decisions Of Other Courts Of Appeals; In Any Case, The Issue At A Minimum Is An Unresolved Issue Of Nationwide Importance And Should Be Settled Now.

In *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), the Court determined that prison regulations that authorized administrators to deny visitation privileges in particular circumstances failed to establish a "liberty interest" because "[t]hey stop short of requiring that a particular result is to be reached upon a finding that the substantive predicates are met." *Id.* at 464. Thus, the Court reasoned, although "[v]isitors may be excluded if they fall within one of the described categories," "they need not be." *Id.* Here, as in *Thompson*, inmates found by "substantial evidence" to have committed disciplinary infractions "may be" assigned to segregation for a period of time, but they "need not be." This, without more ought

to have compelled the Ninth Circuit to affirm with respect to the disciplinary segregation issues; instead, the Ninth Circuit followed the reasoning of the *dissent* in *Thompson*, see 490 U.S. at 475 (Marshall, J., joined by Brennan, and Stevens, JJ., dissenting).

As this Court has stated in a related context, "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). Indeed, other courts of appeals to have addressed issues of this nature have dutifully followed *Thompson's* reasoning.

The decision below, for example, directly conflicts with the Eighth Circuit's analysis in *Burgin v. Nix*, 899 F.2d 733 (8th Cir. 1990). There, the regulations at issue effectively stated that the prison officials must find an inmate to be incorrigible before he may be given a sack lunch instead of the usual tray lunch. Applying *Thompson*, the Court held that the regulations did not create a liberty interest in being served tray lunches because the regulations did not mandate that prison officials serve sacked lunches to inmates found to be incorrigible. 899 F.2d at 735. Likewise, the Ninth Circuit's ruling conflicts with the Seventh Circuit's analysis in *Woods v. Thieret*, 903 F.2d 1080 (7th Cir. 1990) (per curiam). There, while prison rules "mandate[d] who shall make the determinations and what shall be considered," including "three substantive predicates," "they do not mandate any particular outcome with regard to the substantive predicates." *Id.* at 1083. Because a decision to place an inmate on "lockdown" was not mandated by the prison rules for

any specific situation the rules did not create a liberty interest. *Id.* The Ninth Circuit's analysis in this case thus not only conflicts with this Court's own holding in *Thompson*, but at least two circuits' construction of that holding.

Review should be granted, in that, at a minimum, federal judicial recognition of "liberty interests" as stemming from state prison disciplinary schemes that do not affect "good time" credits and that do not necessarily impact on parole considerations raises unsettled issues of nationwide import that the Court should review. In *Thompson* itself, the Court was able to avoid a substantial claim, presented both by the Petitioner in that case, and more than thirty States' Attorneys General, *see* 490 U.S. at 455 n.*, urging the Court "to adopt a rule that prison regulations, regardless of the mandatory character of their language or the extent to which they limit official discretion, 'do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement.'" 490 U.S. at 461 n.3. The Court "express[ed] no view on the proposal and le[ft] its resolution for another day." *Id.* at 462 n.3. The decision below calls upon this Court to decide this issue, which is of vast importance to all of the States.

The Ninth Circuit's decision to extend due process protection to any prison disciplinary proceeding that threatens to impose disciplinary segregation is not tied to any principle that this Court has espoused in its Due Process jurisprudence.

In the leading case in this area, *Wolff v. McDonnell*, 418 U.S. 539 (1974), for example, Nebraska had created a scheme for the forfeiture of good-time credits, without providing due process protections. The Court subjected the scheme to analysis of "the process due," after determining that, because "the State ha[s] created the right to good time and itself recogniz[ed] that its deprivation is a sanction authorized for major misconduct," "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Id.* at 557. As the Court would later hold in *Montanye v. Haymes*, 427 U.S. 236, 242 (1976) "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." The Court has also emphasized "that regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to 'liberty,' different from statutes and regulations in other areas." *Hewitt v. Helms*, 459 U.S. 460, 470 (1983). In *Hewitt*, the Court did state that a liberty interest had been created by Pennsylvania's procedures for administrative detention; but the Court found that no Due Process violation had been shown. *See* 459 U.S. at 472-78. Thus, *Hewitt's* statements that the State had "created a protected liberty interest" are ultimately *dicta*, and "[i]t is the holdings of [the Court's] cases, rather than their *dicta*,

that we must attend." *Kokkonen v. Guardian Life Insurance Co.*, 62 U.S.L.W. 4313, 4315 (U.S. May 15, 1994) (Scalia, J., for a unanimous Court). It is doubtless for just this reason that the "bright-line" rule proposed, and deferred, in *Thompson* remains a pressing question on which this Court has "express[ed] no view," and left "for another day." 490 U.S. at 462. In light of Judge Reinhardt's opinion for the court below, that day, at a minimum, has come. The writ should be granted.

II. Review Should Be Granted To Correct The Ninth Circuit's Intrusive Review Of State Prison Disciplinary Decisions To Refuse To Compel Witness Testimony.

While recognizing, in trial settings, that the judge on the scene "is in the best position to assess the impact and effect of evidence based upon what he perceives from the live proceedings of a trial," *United States v. Layton*, 767 F.2d 549, 554 (9th Cir. 1985), the Ninth Circuit gave no deference to the prison administrators who refused to call witnesses at Conner's request, since, in the words of the Committee, "[w]itnesses were unavailable due to move to the medium facility and being short staffed on the modules." In this case, however, Conner admitted to having "'eyed up'" and cursed at Correctional Officer Furtado during the strip search, admitting to every element of at least two different disciplinary infractions. As this Court held in *Arizona v. Fulminante*, 111 S. Ct. 1246, 1255 (1991), "[a] defendant's confession is 'probably the most probative and damaging evidence that can be admitted against him,'" and, in light of this confession, the record on its

face proves sufficient reason to deny witnesses, even if Respondent had a "liberty interest."

As this Court has made clear since *Wolff*, "[p]rison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence." 418 U.S. at 566. *See also Ponte v. Real*, 471 U.S. 491, 496 (1985). For years, every lawyer practicing in the federal system, when he or she requests discovery in a civil case, has certified that a particular request is "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." Fed. R. Civ. P. 26(g) (as amended Mar. 2, 1987); *see* Fed. R. Civ. P. 26(g)(2)(C) (as amended Dec. 1, 1993). The quoted language from *Wolff*, which at a minimum reflects similar concerns, has prompted rulings in virtually every Circuit that stand for the proposition that prison disciplinary committees have broad authority to reject proffered testimony as cumulative or irrelevant. *See, e.g., Forbes v. Trigg*, 976 F.2d 308, 318 (7th Cir. 1992) (allowing refusal to call witnesses whose testimony is "irrelevant or repetitive" or "could have added little" to the proceeding); *Scott v. Kelly*, 962 F.2d 145, 147 (2d Cir. 1992) ("'a prisoner's request for a witness can be denied on the basis of irrelevance or lack of necessity'"); *Ramer v. Kerby*, 936 F.2d 1102, 1104 (10th Cir. 1991) (allowing denial of prisoner requests if officials "affirmatively determine" that the proposed testimony

"would be irrelevant, cumulative, or otherwise unnecessary for the committee to come to a fair resolution of the matter"); *Brown v. Frey*, 889 F.2d 159, 168 (8th Cir. 1989) (en banc).

Here, where Conner had confessed to the material elements of the charged conduct, and where neither he nor the Ninth Circuit took issue with the validity of his confession, the Ninth Circuit's remand simply makes nonsense of the law. As this Court ruled in a related context, "if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute . . . which has some significant bearing" on the matter in controversy. *Codd v. Velger*, 429 U.S. 624, 627 (1977) (per curiam). Here, as in *Codd*, Conner "made out no claim under the Fourteenth Amendment that he was harmed by the denial of [witnesses]." *Id.* at 628. At the very least, the record does not allow any reasonable factfinder to conclude that Conner was unconstitutionally denied witnesses.

Because the Ninth Circuit's reversal of summary judgment on the denial of witnesses issue conflicts with this Court's decisions in *Wolff*, and *Ponte*, and with a broad array of rulings in the courts of appeals, the Court should grant certiorari.

III. Review Should Be Granted, At A Minimum, To Correct The Ninth Circuit's Drastic Disregard Of *Harlow* Immunity.

As the foregoing demonstrates, it is clear that the Ninth Circuit was unwarranted in concluding that Conner had raised a genuine dispute of material fact with

respect to the merits of his claims "at all," *Siebert v. Gilley*, 111 S. Ct. 1789, 1793 (1993). But what is perhaps most disturbing of all is the Court of Appeals' drastic curtailment of the generous protections of the doctrine of qualified immunity in this case.

As this Court has emphasized, qualified immunity is a "protective" doctrine that " 'provides ample support to all but the plainly incompetent or those who knowingly violate the law.' " *Burns v. Reed*, 111 S. Ct. 1934, 1944 (1991) (quoting *Malley v. Briggs*, 475 U.S. 334, 341 (1986)). The scope of the doctrine's protections is not to be judged by reference to "abstract rights," *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). And this is especially so where the constitutional rights at stake "have been expressed in terms of 'unreasonable' " government conduct. *Id.* at 643. Since this Court adopted an "objective" test for qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), it has been clear "that officials performing discretionary functions are not subject to suit when [federal] questions are resolved against them only after they have acted," and "hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). The "decisive fact is not that [a defendant's] position turned out to be incorrect, but that the question was open at the time he acted." *Id.* Such "facts," at worst, are present, and mandate immunity.

In denying immunity to Petitioner Sandin, the Ninth Circuit fundamentally misconstrued the teachings of this Court, and in a way that plainly warrants review, or, at a minimum, a summary remand. *Cf. Inaba v. Soong*, 112 S. Ct. 40 (U.S. Oct. 7, 1991).

First, if nothing else, this Court's explicit reservation of issues in *Thompson*, see 490 U.S. at 462 n.3, constitutes the very sort of authoritative deferral that should allow officials to continue to press legal claims and defenses without fear of personal liability. After all, when this Court "leave[s]" "for another day," a particular defense to Due Process challenges, it is intolerable that state officials be subject to personal-capacity damage actions by provoking review of that defense. To let the Ninth Circuit's decision stand would not only "substantially thwart the development of important questions of law by freezing the first initial decision rendered on a particular legal issue," *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (Rehnquist, J., for a unanimous Court); it would freeze the law in such a way that a legal issue would never be litigated.

Second, wholly apart from the "'bright line'" argument that renders any particularized analysis of Hawaii's prison rules irrelevant to the Due Process issues in this case, it is hardly "incompetent" to assert that *Thompson's* "mandatory outcomes" test precludes the conclusion that Hawaii has created liberty interests. The fact that *Thompson*, without response to Justice Marshall's dissent, held that no liberty interest was created because visitors "need not be" excluded, is – and should be – enough to warrant qualified immunity as a matter of law on the record present. For this reason, too, review is warranted.

Third, by relying on the "abstract" right to call witnesses outlined (for good-time-credit States, such as Nebraska) in *Wolff*, the Ninth Circuit committed the very error that this court reversed in *Anderson v. Creighton*, 483 U.S. 635 (1987). The determination, by Judges Reinhardt,

Browning, and Norris, to strip Petitioner of her qualified immunity for denying witnesses, even though inmate Conner undisputedly confessed to swearing at Correctional Officer Furtado, "convert[s] the rule of qualified immunity that [this Court's] cases plainly establish into a rule of virtually unqualified liability." 483 U.S. at 635. Like other refusals by the Ninth Circuit to recognize qualified immunity, see, e.g., *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1992), this conversion should be reversed.

At a minimum, the Ninth Circuit's decision appears to be colored by the narrow review given to immunity issues in the Ninth Circuit prior to this Court's reversal in *Elder v. Holloway*, 114 S. Ct. 1019 (1994). *Elder* unequivocally mandates that "[w]hether an asserted federal right was clearly established at a particular time so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts,' " which, "like the generality of such questions, must be resolved *de novo* on appeal." 114 S. Ct. at 1023. Most significantly, *Elder* mandates that "[a] court engaging in review of a qualified immunity judgment should therefore use its 'full knowledge of its own [and other relevant] precedents.'" *Id.* By remanding Petitioner for "a fuller development of the record" (Pet. App. A9), where, *inter alia*, the record absolutely and unequivocally shows that Connor confessed, the Ninth Circuit simply abdicated its appellate function, and disobeyed the requirements of the *Elder* decision.

Because the Ninth Circuit did not have the benefit of this Court's decision in *Elder*, at a minimum the Court may wish to grant the petition, vacate the judgment, and

remand for further consideration in light of *Elder v. Holloway*, *supra*.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari. Because the decision in *Elder v. Holloway*, 114 S. Ct. 1019 (U.S. Feb. 23, 1994), was handed down only two days before rehearing was denied, the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of *Elder*. In any event, the Court should grant the petition for certiorari.

Dated: Honolulu, Hawaii, May 26, 1994.

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APPENDIX "A"
FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEMONT R.D. CONNER,)	No. 91-16704
<i>Plaintiff-Appellant,</i>)	
v.)	D.C. No.
THEODORE SAKAI et al.,)	CV-88-0169-ACK
<i>Defendants-Appellees.</i>)	ORDER AND
)	AMENDED
)	OPINION

Appeal from the United States District Court
for the District of Hawaii

Alan C. Kay, District Judge, Presiding

Submitted November 5, 1992*
Honolulu, Hawaii

Filed June 2, 1993
Amended February 2, 1994

Before: James R. Browning, William A. Norris, and
Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt

*The panel unanimously finds this case suitable for submission on the record and briefs without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 34-4.

OPINION

REINHARDT, Circuit Judge:

DeMont R.D. Conner, a Hawaii state prisoner serving a thirty-years-to-life sentence, appeals pro se the district court's grant of the state's motion for summary judgment, and the district court's denial of his cross-motion for summary judgment on his § 1983 suit against a number of prison officials¹ and the State of Hawaii. We reverse, as to certain of the defendants, the district court's grant of summary judgment in the state's favor on certain of Conner's claims: that he was improperly subjected to disciplinary segregation and that he was punished for praying aloud in Arabic with a fellow inmate. We affirm the remainder of the district court's order, including the denial of Conner's cross-motion for summary judgment.

II.

A. State's Motion for Summary Judgment

1. Sovereign Immunity

The state correctly contends that the eleventh amendment bars Conner's suit against the State of Hawaii, *Hans*

¹ The named defendants are Theodore Sakai, Acting Administrator, Department of Institutions; Harold Falk, Director of Corrections; and several administrators of the Halawa Correctional Facility; Lawrence Shohet, Corrections Supervisor; William Oku, Administrator; Leonard Gonsalves, Chief of Security; Cinda Sandin and Francis Sequeira, Unit Team Managers; and seven Adult Corrections Officers (ACOs), William Summers, Robert Johnson, Gordon Furtado, Abraham Lota, Edward Marshal, William Paaga, and Brian Lee.

v. Louisiana, 134 U.S. 1 (1890), 10 S. Ct. 504, *Quern v. Jordan*, 440 U.S. 332, 338-41, 99 S. Ct. 1139, 1143-45 (1979),² and Conner's suit against the other defendants in their official capacities, *Hafer v. Melo*, 112 S. Ct. 358, 362 (1991). However, the eleventh amendment does not bar Conner's suit against the other defendants in their personal capacities. *Id.* at 362.

2. Disciplinary Segregation

Conner contends that the disciplinary segregation imposed on him after a hearing on August 28, 1987, violated his right to due process. He asserts that, before the hearing, he was not given a summary of the facts leading to the charges, that he was not permitted to question the guard who charged him with the offense, that he was not allowed to call witnesses at the hearing, and that his testimony was "doctor[ed]" and used against him. We agree that Conner has presented a genuine issue of material fact as to whether his hearing comported with due process.

[1] The first issue we face is whether Conner had a liberty interest, protected by the fourteenth amendment, in not being arbitrarily placed in disciplinary segregation. The fourteenth amendment protects liberty interests arising from the Due Process Clause or created by state law. *Hewitt v. Helms*, 459 U.S. 460, 466, 103 S. Ct. 864, 868-69

² Conner claims that the State has waived its immunity through Haw. Rev. Stat. § 662-2. However, this section waives the state's immunity only as to tort suits. Conner does not make out a tort claim.

(1983). To discover whether state law has created a liberty interest, we must "examine closely the language of the relevant statutes and regulations" to see whether the state has placed "substantive limitations on official discretion." *Kentucky Dep't of Corrections v. Thompson*, 109 S. Ct. 1904, 1909 (1989) (internal quotation omitted; citation omitted). Most commonly a state fetters official discretion by a two-step process. First, the state establishes "substantive predicates" to govern official decisionmaking. These are "particularized standards or criteria to guide the State's decisionmakers." *Id.* Next, the state requires, in "explicitly mandatory language," that if the substantive predicates are met, a particular outcome must follow. *Id.* at 1909-10. We conclude that Hawaii's regulations create a liberty interest in remaining free from disciplinary segregation. The regulations provide explicit standards that fetter official discretion. Under Title 17, subtitle 2 (Corrections Division), Department of Social Services and Housing, § 17-201-18(b) ("§ 17-201-18(b)"), the inmate must admit guilt or the prison disciplinary committee must be presented with substantial evidence before the committee may make a finding of guilt. If the inmate does not admit guilt, or the committee does not find substantial evidence, the particular outcome - freedom from disciplinary segregation - must follow. § 17-201-18(b).

Having found that Conner possessed a liberty interest in not being confined to disciplinary segregation, we now proceed to the issue whether he was afforded sufficient process before being so confined.

i. summary of facts

Under the Due Process Clause, an inmate facing a disciplinary hearing must be given advance notice of the hearing. *Wolff v. McDonnell*, 418 U.S. 539, 563-65, 94 S. Ct. 2963, 2978-79 (1974). Even if state administrative regulations supply additional process due to inmates of Hawaiian prisons, *see* § 17-300-3 *et seq.*,³ and even if inmates may sue to enforce such regulations in federal court, there is no genuine issue of material fact as to whether Conner was given the opportunity to review the facts and other materials supporting the charge against him. The record contains a form, apparently signed and dated by Conner, that recites the charge against him and states, "Facts supporting the charge(s) are as stated on the attached Misconduct Report." Because Conner does not contest that he signed and dated the form or that the misconduct report was attached, and does not otherwise dispute the authenticity of the form, he has failed to show that a genuine issue of material fact exists as to this contention. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986); Fed. R. Civ. Pro. 56(c).

³ Section 17-201-16(c) requires that an inmate be given an opportunity to review all relevant non-confidential reports of misconduct or a summary of such reports between the time the inmate receives notice of the hearing and the hearing itself. Section 17-201-16(d) provides that the misconduct reports or summary "shall contain" a description of the specific rule alleged to have been violated, the facts that support the charge, and the names of witnesses.

ii. cross-examination

No genuine issue of material fact exists as to Conner's contention that he was not permitted to cross-examine the guard who charged him with misconduct. The Due Process Clause does not require prison administrators to afford inmates such a right. *Wolff v. McDonnell*, 418 U.S. at 567-69, 94 S. Ct. at 2980-81. Even if state regulations may be enforced in a case such as this, Hawaii has not created a due process right to cross-examine witnesses at a disciplinary hearing.⁴

iii. alteration of testimony

Conner has not raised a genuine issue of material fact to support his contention that his testimony at his hearing was doctored. His affidavits do not disclose the alterations allegedly made. Bare allegations do not suffice to

⁴ Under § 17-200-16(e), the prison may decline to permit the inmate to cross-examine witnesses at a disciplinary hearing. It states that the inmate "may" be given the opportunity to confront and cross-examine adverse witnesses unless, in the judgment of the disciplinary committee, such a confrontation would

- (A) Subject the witnesses to potential reprisal;
- (B) Jeopardize the security or good government of the facility;
- (C) Be unduly hazardous to the facility's safety or correctional goals; or
- (D) Otherwise reasonably appear to be impractical or unwarranted.

§ 17-200-16(e)(2). If the inmate is not permitted to confront or cross-examine adverse witnesses, the disciplinary committee "is encouraged" to record the reason for the denial and to explain the reason to the inmate. § 17-200-16(e)(3).

defeat a motion for summary judgment: Conner's obligation, rather, was to relate "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2552.

iv. witnesses

[2] Under *Wolff v. McDonnell*, an inmate "should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." 418 U.S. at 566, 94 S. Ct. at 2979. The state's regulations, even if applicable, do not expand on this right.⁵ A genuine issue of material fact exists as to Conner's contention that he was not permitted to call witnesses at his hearing. The record contains a form, apparently distributed to Conner after the hearing, that states that witnesses were unavailable at the hearing "due to the move to the medium facility and being short staffed on the modules."

Prison disciplinary committees may not deny a defendant the right to call important witnesses solely for the sake of administrative efficiency. *Bostic v. Carlson*, 884 F.2d 1267, 1273 (9th Cir. 1989). Rather they must show the adequacy of their justification for denying a request to

⁵ The state's regulation's [sic] track *Wolff v. McDonnell*, *supra*, in stating that the inmate "should" be given the opportunity to call witnesses "as long as it will not be unduly hazardous to institutional safety or correctional goals." § 17-200-16(f)(1). Reasons for denial of such an opportunity are irrelevance, lack of necessity, the hazards presented in the individual case, and "any other justifiable reason." § 17-200-16(f)(2).

present witnesses in a disciplinary proceeding. *Id.* Further, we note that "[t]he security issues that concerned the Wolff Court were the risk of death or injury to inmate witnesses and informants identified at hearings or in produced documents, as well as the potential for breakdown in authority, order and discipline inside the institution." *Young v. Kann*, 926 F.2d 1396, 1400 & nn. 8, 9 (3d Cir. 1991). It is not clear that these were the concerns that motivated the disciplinary committee that considered Conner's case.

[3] In the context of a motion for summary judgment, the prison's burden to show the adequacy of its justification for denying an inmate the right to present witnesses at his hearing is the one it would bear in a motion for a judgment as a matter of law (directed verdict) under Fed. R. Civ. Pro. 50(a). *Celotex Corp. v. Catrett*, 477 U.S. at 323, 106 S. Ct. at 2552. Such a burden requires that the evidence "permit[] only one reasonable conclusion as to the verdict." *McGonigle v. Combs*, 968 F.2d 810, 816 (9th Cir. 1992), *cert. denied sub nom. Casares v. Spendthrift Farm, Inc.*, 113 S. Ct. 399 (1992). In stating without more that "witnesses were unavailable due to [the] move to the medium facility and being short staffed on the modules," the state has not met its affirmative burden.

Conner links only Defendant Sandin to the denial of his right to call witnesses.⁶ The state claims that all of the

⁶ In his affidavit of May 17, 1988, Conner states: "On August 28, 1987, Defendant Cinda Sandin did violate my right to due process when she denied me the right to question the correctional officer whom had written me up, and to review the submitted reports, and to call witnesses."

defendants, including Defendant Sandin, are protected by qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S.Ct. 2727, 2737 (1982); *Anderson v. Creighton*, 483 U.S. 635, 640-41, 107 S. Ct. 3034, 3039-40 (1987); *Erickson v. United States*, 976 F.2d 1299, 1301 (9th Cir. 1992). Under the doctrine of qualified immunity, the issue is whether the right infringed was clearly established at the time of the defendant's complained-of action, and whether a reasonable official could have believed that his or her actions did not violate that right. *Anderson v. Creighton*, 483 U.S. at 640-41, 107 S. Ct. at 3039-40. The right to call witnesses at a disciplinary hearing has been clearly established since *Wolff v. McDonnell* was decided in 1974. Whether a reasonable official could have believed his actions in denying Conner the requested witnesses were lawful is a matter that cannot be decided without a fuller development of the record.

Accordingly, summary judgment as to Conner's claim regarding disciplinary segregation is reversed with respect to Defendant Sandin.⁷

3. Prayer in Arabic

Conner alleges that his first and fourteenth amendment rights were violated when prison officials punished him for praying aloud in Arabic. He was punished for violating a prison rule that requires inmates to "communicate in the English language only; including telephone

⁷ Conner also contends that no evidence supported the disciplinary committee's finding of guilt. However, he has not supported his contention with an affidavit or a verified complaint.

calls, visits, and letters." Conner contends that as a Muslim he must say his prayers in Arabic and that he must say them aloud; that on February 1, 1989, he was a recent convert to Islam and had only begun to learn Arabic; and that on that day he was praying aloud in Arabic in unison with a more experienced fellow inmate when Defendants Paaga and Lee ordered the two men to speak in English only. When Conner refused to comply, Defendant Paaga issued a misconduct report, which led to Conner's confinement in disciplinary segregation for fourteen days. In addition to Defendants Paaga and Lee, Conner seeks relief from Defendants Oku, Sakai, and Falk for the deprivation of due process he claims to have suffered.

[4] Construing the facts most favorably to Conner, as we must on a motion for summary judgment, *see Leer v. Murphy*, 844 F.2d 628, 631 (9th Cir. 1988), we assume that Conner was punished after refusing to stop praying in Arabic.⁸ It is a fundamental element of due process that conduct may be punished under a rule only if that rule proscribes the conduct. It seems clear that the prison's English-only rule does not apply to prayer. We believe that the plain meaning of the rule forbids the non-English interchange of information between or among humans, not between humans and their gods. If the rule were intended to apply to "communication" with divine beings, certainly the term "prayer" would have been

⁸ The misconduct report states that Conner was punished for refusing to obey Defendant Paaga's order. However, because Defendant Paaga's order was to stop speaking in a foreign language, we consider whether, under the Due Process Clause, Conner may be punished for violating the underlying rule.

used. Nor do the examples provided in the rule – telephone calls, visits, and letters – suggest a more holy meaning.

[5] In addition, even if the interpretation of the rule could be stretched to include prayer, we would hold that the due process clause forbids the implementation of such a construction. The due process clause bars the state from imposing punishment on the basis of an unexpected and unusual interpretation of plain language. *See Bouie v. City of Columbia*, 378 U.S. 347, 352, 84 S. Ct. 1697, 1702 (1964). The language of the English-only rule on its face clearly proscribes only inter-personal communication, and the examples accompanying the rule reinforce such a reading. Had the state desired to proscribe praying aloud, language clearly proscribing such conduct could been [sic] included in the rule.⁹ *See United States v. Petrillo*, 332 U.S. 1, 7, 67 S. Ct. 1538, 1540 (1947) (upholding a law against a void-for-vagueness challenge because no "clearer and more precise language. . . . occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose"). The interpretation of the English-only rule sought by the state would be most unexpected and highly unusual. Therefore, the rule cannot be constitutionally applied to the conduct at issue here: it gives inmates insufficient notice that they are forbidden to pray in a foreign language.

⁹ We indicate no view regarding the constitutionality of such a proscription.

Conner does not proximately connect Defendants Oku, Sakai, and Falk to the constitutional wrong he has suffered. Summary judgment was therefore appropriate as to these defendants. *Leer v. Murphy*, 844 F.2d at 633-34; *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). The state maintains that Defendants Paaga and Lee are immune from suit. It is true that government officials performing discretionary functions enjoy a qualified immunity insofar as their conduct does not violate statutory or constitutional rights of which a reasonable person should have known. See *Harlow v. Fitzgerald*, 457 U.S. at 818, 102 S. Ct. at 2738. As indicated by our discussion above, we believe a reasonable official would have known that a regulation that forbids communication in a foreign language does not forbid prayer. Thus, the state cannot assert the defense of qualified immunity based on uncertainty in the law or the law's application to this case.

Nevertheless, Defendants Paaga and Lee may still be entitled to qualified immunity. The proper question is whether, at the time of the challenged conduct, a reasonable official would have understood that the actions of Defendants Paaga and Lee violated Conner's rights. *Anderson v. Creighton*, 483 U.S. at 640-41, 107 S. Ct. at 3039-40. Thus, if a reasonable official would not have realized that Conner was praying but could have thought that he was simply communicating with humans regarding earthly subjects, Defendants Paaga and Lee would be entitled to qualified immunity. On remand, the district court should consider whether Defendants Paaga and Lee are entitled to qualified immunity on this basis.

4. Denial of Access

[6] Conner has submitted affidavits alleging that certain defendants have deprived him of legal materials; however, he has failed to allege or offer evidence of "actual injury" with respect to court access as a result of these deprivations. When a claim of denial of access to the courts does not involve inadequate law libraries or inadequate legal assistance, actual injury must be alleged. *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989). Summary judgment on this issue is therefore affirmed.

5. Review of Confinement

Conner argues by reference to *Sims v. Falk*, No. 88-0348-DAE (D. Ha. 1989), that he has been denied meaningful periodic review of his confinement in the maximum security portion of the prison.¹⁰ However, his affidavit in support of his contention is conclusory. Without supporting facts, we are required to hold that summary judgment was properly granted on this issue.

¹⁰ The district court in *Sims*, assessing the same claim made against several of the same defendants (Falk, Oku, and Shobet) regarding the same portion of the same prison, held that such confinement was punitive rather than classificatory in nature, and issued a preliminary injunction that ordered the prison to review *Sims'* confinement not less than every thirty days and to permit *Sims* to meaningfully participate in the review. The complaint was later dismissed by stipulation.

6. Possession of Written Rules

Conner argues, again by reference to *Sims*, that due process entitles him to retain a copy of the written rules that set the standard against which inmates' behavior is judged within the prison. He states in an affidavit that he has not been given a copy of such rules. The prison contends that Conner has been furnished with a copy of the *Inmate Handbook*. A question of material fact thus exists as to this contention. However, Conner has not proximately connected any of the defendants to the loss he claims to have suffered. Therefore, his argument fails. *Leer v. Murphy*, 844 F.2d at 633-34; *Taylor v. List*, 880 F.2d at 1045.

7. Legal Status of the Segregation and Maximum Custody Program

Conner contends that the existence of the Segregation and Maximum Custody Program ("Program") has violated his right to due process because the Program was never correctly authorized by the Director of the Department of Social Services or the Governor of Hawaii. He asserts that § 17-200-1 and Haw. Rev. Stat. § 353-3 create a liberty interest in not being subject to any law not explicitly authorized by the governor, that the Program lacks the signatures required by the statute, and that without the signatures the Program does not have the force of law.¹¹

¹¹ Section 17-200-1 states:

This subtitle shall govern the corrections division of the department of social services and housing, State

Whether or not the Program was approved by the director or the governor, and whether or not the conjunction of § 17-200-1 and Haw. Rev. Stat. § 353-3 creates a liberty interest, Conner's claim fails. The Program was implemented in 1981, according to an affidavit of Defendant Shohet, while § 17-200-1 did not become effective until October 6, 1983. Therefore, § 17-200-1 does not govern the Program and cannot create a liberty interest.

In addition, Conner appears to argue that the Program is invalid because it does not comply with the Hawaii Administrative Procedures Act. Conner's argument appears to make a state claim. Such claims are barred in § 1983 suits. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 121, 104 S. Ct. 900, 919 (1984). Summary judgment on this issue is affirmed.

of Hawaii. Each individual facility may adopt rules governing its unique situation pursuant to Chapter 353, subject to the approval of the director of the department of social services and housing and the governor.

The version of Haw.Rev.Stat. § 353-3 in effect when the Program was implemented provided that

[t]he director of social services and housing . . . may make and from time to time alter or amend rules relating to the conduct and management of [the state correctional] facilities and the care, control, treatment, furlough and discipline of persons committed to his care, which rules must be approved by the governor. . . .

8. *The Program as a Behavior Modification Program*

Conner argues that the Program is invalid because its policy of providing privileges for good conduct is a behavior modification program of the type rejected in *Canterino v. Wilson*, 546 F. Supp. 174 (W.D. Ky. 1982), as amended, 562 F. Supp. 106, *aff'd*, 875 F.2d 862 (6th Cir. 1989), *cert denied*, 493 U.S. 991, 110 S. Ct. 539 (1989). *Canterino* was decided under an eighth amendment theory. Construing Conner's complaint and affidavits liberally, see *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594 (1972), *United States v. Bigman*, 906 F.2d at 395, we conclude that Conner contends that the prison's behavior modification program is so unnecessarily restrictive to constitute cruel and unusual punishment.¹²

Conner alleges that Defendants Falk, Sakai, Oku, and Shohet are responsible for deprivation he contends he has

¹² In his affidavit of March 6, 1989, Conner states that the most restrictive non-disciplinary confinement within the Program is virtually identical to disciplinary segregation, see *Canterino*, 546 F. Supp. at 184; that an inmate is permitted to move to a less restrictive environment only after completing a set number of days free of misconduct and that a single act of misconduct erases all the accumulated days and forces an inmate to begin at the beginning, see *id.* at 187; that the Program, as administered, leaves Conner "edgy often, argumentative, and frustrative," see *id.* at 184, 186; and that no written criteria are made available to him so that he will know what behavior is required in order to move to less restrictive environments, see *id.* at 187. In his affidavit of December 26, 1989, he alleges that, while he is confined in the most restrictive prison environments, he is denied periodic reviews of his confinement; allowed inadequate exercise time; and denied permission both to receive newspaper articles, brochures, books, and magazines through the mail, and to contest the rulings of those who censor his mail.

suffered. His contention fails as to Defendant Falk because his affidavit is made on information and belief, not on the personal knowledge required by Fed. R. Civ. Pro. 56(e). See *Taylor v. List*, 880 F.2d at 1045 n.3. His claim fails as to Defendants Sakai, Oku, and Shohet because he neglects to set forth facts that proximately connect them with the constitutional injury he contends they inflicted. *Id.* at 1045; *Leer v. Murphy*, 844 F.2d at 633-34.¹³

Additionally, Conner asserts that the Program violates Haw. Rev. Stat. § 465(2), which requires those who practice psychology to be licensed. Such a contention presents a state law claim, which is barred under *Pennhurst*, 465 U.S. at 121, 104 S. Ct. at 919.

9. *106 Minor Misconduct Warnings*

Conner claims that he was harassed by prison officials through numerous 106 warnings. These are written citations that in themselves lead to no disciplinary action but the accumulation of which may lead to disciplinary segregation.

Even if such warnings infringe on a protected liberty interest, there is no constitutional violation unless and until the inmate is placed in disciplinary segregation as a

¹³ Conner claims, for example, in an affidavit dated December 26, 1989, that Defendants Oku and Shohet "are liable for depriving [him] of adequate exercise and recreation when they subject [him] to 22 hours of punitive isolation." Assuming without deciding that twenty-two hours of punitive isolation constitutes cruel and unusual punishment, Conner's contention lacks the specificity necessary to defeat a motion for summary judgment.

result of the accumulated warnings. Conner has not set forth any facts that indicate that the warnings he received resulted in any punishment. Therefore, he has failed to support this claim.

10. Retaliation Claim

Finally, Conner contends that the defendants have retaliated against him for his activities as a jailhouse lawyer. However, none of his allegations is supported by an affidavit or verified complaint. Summary judgment on this issue is therefore affirmed.

B. Conner's Cross-Motion for Summary Judgment

The foregoing discussion makes clear that the only issues on which Conner might be entitled to summary judgment are disciplinary segregation and prayer in Arabic. The state has presented genuine issues of material fact as to both these claims. The district court's denial of Conner's cross-motion for summary judgment is therefore affirmed.

III.

The district court's grant of the defendants' motion for summary judgment is reversed on the following issues: the disciplinary segregation claim as to Defendant Sandin; and the prayer claim as to Defendants Paaga and Lee. Summary judgment is upheld on all other claims and as to all other defendants. The district court's denial of Conner's motion for summary judgment is affirmed.

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED.**

APPENDIX "B"

JUDGMENT

 UNITED STATES COURT OF APPEALS
 FOR THE NINTH CIRCUIT

NO. 91-16704
 CT/AG#: CV-88-00169-ACK

DEMONT R.D. CONNER

Plaintiff - Appellant

v.

THEODORE SAKAI, et. al.

Defendant - Appellee

(MANDATE ISSUED
 Mar. 25, 1994)

APPEAL FROM the United States District Court for
 the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of
 the Record from the United States District Court for the
 District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here
 ordered and adjudged by this Court, that the judgment of
 the said District Court in this cause be, and hereby is
 AFFIRMED in part, REVERSED in part, and
 REMANDED.

Filed and entered February 2, 1994

APPENDIX "C"

 IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF HAWAII

DEMONT R.D. CONNER,)	CIV. NO.
)	88-0169 ACK
Plaintiff,)	
)	
vs.)	
)	
THEODORE SAKAI, et al.,)	
)	
Defendants.)	
)	

ORDER ADOPTING MAGISTRATE'S REPORT AND
RECOMMENDATION GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

(Filed Sept. 30, 1991)

I. INTRODUCTION

On May 20, 1991, the Magistrate entered a report and
 recommendation (R & R) wherein it was recommended
 that this court grant defendants' motion for summary
 judgment, deny plaintiff's motion for summary judg-
 ment, and dismiss the complaint with prejudice. On June
 18, 1991, plaintiff filed his objections to the R & R.

For the following reasons, the court adopts the R & R.

II. FACTS

Plaintiff is an inmate at Halawa High Security Facil-
 ity (HHSF). Plaintiff filed a pro se complaint in 1986
 alleging violations of his rights under 28 U.S.C. § 1983.

The complaint was thereafter amended twice, the last amendment occurring on September 8, 1989.

In the current amended complaint, plaintiff alleges that his constitutional rights were being violated under 28 U.S.C. §§ 1983, 1985(3), and 1986. Plaintiff seeks a declaratory judgment, injunctive relief, and money damages. All defendants are officials of the state's prison system and are sued in their official and individual capacities.

The complaint alleges violations of plaintiff's First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. In addition, the complaint alleges that plaintiff's rights under the Hawaii state constitution were violated. In particular, plaintiff makes the following claims in his complaint:

- (1) defendants impermissibly subjected plaintiff to a behavior modification program that was invalid under state law;
- (2) defendants subjected plaintiff to punitive isolation pursuant to the behavior modification program without due process of law, and in violation of state law;
- (3) defendants denied plaintiff adequate exercise and recreation in violation of state law and the Eighth Amendment;
- (4) defendants' strip-search policy violated plaintiff's right to privacy;
- (5) defendants used "#106 Minor Misconduct" forms against plaintiff in violation of due process of law;
- (6) defendants were deliberately indifferent to plaintiff's (and all inmates') medical needs;

- (7) defendants violated plaintiff's free exercise rights to religion;
- (8) defendants' "blanket policy" regarding items plaintiff could receive through the mail violated plaintiff's rights;
- (9) defendants violated plaintiff's freedom of association and expression rights by way of defendants' "publishers only" rule, and defendants' rule requiring plaintiff to first donate the publication to the state;
- (10) defendants subjected plaintiff to excessively long periods of punitive confinement in dehumanizing "strip-cells;"
- (11) defendants subjected plaintiff to "double-celling" in inadequately lighted cells for 17 hours per day;
- (12) defendants subjected plaintiff to retribution for his activities as a jail-house lawyer;
- (13) defendant's "English-only" rule violated plaintiff's rights to freedom of expression, speech, religion and association;
- (14) defendants violated plaintiff's Eighth Amendment rights by denying him psychological and psychiatric treatment while he was in the behavior modification program; and
- (15) defendants denied plaintiff his state-created liberty interests in participating in educational, vocational, and counseling programs that are mandated by state law.

Defendants moved for summary judgment. Plaintiff filed a cross-motion for summary judgment. The Magistrate's R & R recommended that defendants' motion be

granted, and that plaintiff's motion be denied. In addition, the Magistrate recommended that the complaint be dismissed with prejudice.

III. DISCUSSION

A. Standard of Review

Any party may file objections to a R & R by filing the same within 10 days of service of the R & R. Local Rule 404-2. This court "shall make a de novo determination of those portions of the [R & R] to which objection is made. . . ." *Id.* (bold in original).

B. The Merits

The R & R was served on May 21, 1991. Pursuant to Fed.R.Civ.P. 6(a), the parties had until June 5, 1991 to file objections. Defendants filed no objections. Plaintiff filed a motion to extend the time within which to file objections. The motion was filed May 31, 1991 and requested that plaintiff be granted leave to "submit his objections within . . . the week of June 10, 1991." This court partially granted the motion, giving plaintiff until June 10, 1991 to file his objections. Plaintiff's objections were filed on June 18, 1991, although the objections were signed and dated by plaintiff on June 6, 1991.

The court is somewhat puzzled by the late filing date of plaintiff's objections in that they are dated some 12 days beforehand. Nonetheless, the court will consider the objections as timely filed because of the latitude that must be afforded pro se litigants.

1. Order Partially Granting Extension to File Objections

Plaintiff objects to the order partially granting plaintiff an extension of time to file his objections. Plaintiff complains that the court should have granted plaintiff more time in which to have objected. Plaintiff bases this assertion on the grounds that he needed additional time because of his limited access to the law library. In addition, plaintiff asserts that he needed additional time because of time pressures exerted by other cases he has filed. Plaintiff also claims he needed additional time because of his pro se status and lack of education.

The court rejects plaintiff's contention that it should have granted him additional time. The Local Rules of this court and the United States Code explicitly state that objections are to be served within 10 days of the R & R. 28 U.S.C. § 636(b)(1)(C); Local Rule 404-2. Thus, the court was under no obligation to extend that time period. Nonetheless, the court gratuitously extended the deadline. In the motion requesting additional time, plaintiff's only stated reason for the request was the fact that he has many lawsuits he has filed which also require his attention. Under the circumstances, the court's extension was not unreasonable. Furthermore, the court notes that plaintiff's contention that his lack of education and his status as a non-lawyer hindered his ability to respond quickly is unconvincing. Plaintiff has amply demonstrated, through his various lawsuits filed in this district, that he is very familiar with the legal system and possesses enough education to confidently and quickly maneuver within the system.

2. The R & R

Plaintiff acknowledges that the R & R is correct insofar as it found that he conceded his claims relating to strip-searches and mechanical restraints. Objections, at 12. Moreover, plaintiff concedes that he does not assert a claim for his "placement" in HHSF's "Segregation and Maximum Control Program" (SMCP). Therefore, with the exception of the above-mentioned issues (strip-searches, mechanical restraints, and any claim that can be construed as a claim of violation of rights relating to plaintiff's placement in SMCP) the court will proceed to address each issue raised by the R & R.

a. Summary Judgment Standard

Plaintiff objects to the Magistrate's summary judgment standard on page 3 of the R & R. This court has reviewed the standard on page 3 of the R & R and concludes that though it is less descriptive than the court would prefer, it is accurate and adequate. Therefore, the court rejects plaintiff's objection on this point.

b. Invalid Rule

Plaintiff objects to the Magistrate's characterization of plaintiff's claims relating to placement in the behavior control program, SMCP. Plaintiff states that he does not contest his placement in the program. Rather, plaintiff contends SMCP is an invalid "rule" to which he should not have been subjected. Moreover, plaintiff claims that

the "invalid rule" violates his rights. For the following reasons, the court rejects this contention.

The SMCP was instituted in 1981. See Shohet's affidavit (attached as exhibit E to plaintiff's opposition to defendants' motion for summary judgment filed January 8, 1990). It is an inmate behavior program wherein inmates demonstrating satisfactory behavior gain greater privileges and advance to more favorable levels of the program. *Id.* SMCP was "geared to the security needs of a high security facility," i.e., HHSF. *Id.* ¶ 4, at 2. SMCP was not approved by either the director of the department of social services and housing, or the governor of the state of Hawaii.

Plaintiff claims the SMCP is an invalid rule because SMCP governs the HHSF facility, and neither the director of the Department and Social Services and Housing (DSSH) nor the governor approved SMCP. This, plaintiff contends was a violation of DSSH Rule 17-200-1, Title 17.

DSSH Rule 17-200-1 provides:

This subtitle shall govern the corrections division of the department of social services and housing, State of Hawaii. Each *individual facility* may adopt rules governing its unique situation pursuant to Chapter 353,^[1] *subject to the approval*

¹ The version of H.R.S. § 353-3 in effect in 1981 when the SMCP was implemented provided that

[t]he director of social services and housing . . . may make and from time to time alter or amend rules relating to the conduct and management of [the state correctional] facilities and the care, control treatment, furlough and discipline of persons committed to his

of the director of the department of social services and housing and the governor. However, suppression of these rules shall be permitted only where necessary due to the unique characteristics of the facility.

(emphasis added).

SMCP affects the individual "facility" of HHSF. See Shohet's affidavit ¶ 4, at 2 (attached as exhibit E to plaintiff's opposition to defendants' motion for summary judgment filed January 8, 1990). Moreover, SMCP was not approved by the director or the governor. Plaintiff cites to *Wilder v. Tanouye*, 753 P.2d 816 (Haw.App. 1988) to indicate that SMCP is an invalid rule.²

Wilder held that Rule 17-200-1 "applie[s] only to rules governing a 'facility'. . . ." 753 P.2d at 824. As noted above, SMCP governs HHSF. *Wilder* also held that former H.R.S. § 353-1.2 provided for the establishment of a high security correctional facility. *Id.* Presumably, HHSF is that facility. Rule 17-200-1 would indicate that SMCP should have been approved by the director and governor in order to be valid.

However, this is not the case. Rule 17-200-1 became effective on October 6, 1983 while SMCP was implemented in 1981. Compare Shohet affidavit and Title 17,

care, which rules must be approved by the governor. . . .

² Plaintiff does not attempt to argue that H.R.S. § 353-3 renders SMCP an invalid rule. Such argument would be meritless because SMCP is applied only to HHSF, and the requirement of 353-3 apply only to rules affecting "correctional facilities . . . on a statewide basis." *Wilder*, 752 P.2d at 824.

Rule 17-200-1 (copy attached to plaintiff's opposition to defendant's motion filed January 8, 1990). Thus, SMCP, when it was implemented, was not subject to Rule 17-100-1 because Rule 17-200-1 did not exist then. Therefore, Rule 17-200-1 is inapplicable to SMCP. SMCP is not an invalid rule.

Plaintiff also argues that SMCP is invalid because it fails to comply to the Hawaii Administrative Procedures Act (HAPA). Plaintiff appears to concede that HAPA is inapplicable to regulations concerning only the internal management of HHSF. See objections, at 5; *Tai v. Chang*, 58 Haw. 386, 387 (1977) ("Under HAPA, the term rule is defined to exclude "regulations concerning only the internal management of an agency."). However, plaintiff appears to contend that SMCP is not an internal management regulation. Plaintiff cites to the "Inmate Guidelines" as an example of internal management regulations exempt from HAPA, and argues that the SMCP is vastly different from the guidelines, and therefore, not an internal management regulation.

The court rejects this argument. The court has reviewed plaintiff's exhibits regarding SMCP and concludes that SMCP is an internal management regulation. SMCP is "geared to the security needs of a high security facility" such as HHSF. Shohet affidavit. Security needs are:

matters relating to the operation and management of state and county penal . . . institutions . . . [and are] primarily a matter of "internal management" [thus] excluded from . . . [HAPA].

House Standing Committee Report No. 8 (1961).

Since SMCP is not an invalid rule, all of plaintiff's objections and claims based on his contention that he has a state-created liberty interest in being free from an invalid rule fail. There is no "invalid" rule upon which to base the state-created liberty interest.³

c. Cruel and Unusual Punishment

Plaintiff objects to the Magistrate's finding that plaintiff's placement in HHSF was not cruel and unusual punishment. Plaintiff claims this issue was not raised by either party in their motions for summary judgment. Alternatively, plaintiff claims that placement in HHSF is punishment and cites to an opinion by Judge Ezra for support. See *Sims v. Falk*, Civil No. 88-348 DAE (Jan. 4, 1989).

Plaintiff's first objection that the issue was not raised by the parties is without merit. Defendants squarely raised the issue in their motion for summary judgment. See defendants' motion, at 7-8.

In addition, as the R & R correctly notes, plaintiff's placement within HHSF is reasonably related to the prison system's legitimate goal of maintaining institutional security and discipline. HHSF was designed to house inmates who attempted escape attempts, assaults, etc. Plaintiff was at HHSF for such reasons. Prior to his incarceration at HHSF, plaintiff attempted to escape. This

³ The court assumes but expressly notes that it does not decide whether plaintiff has a state-created liberty interest in being free from an invalid rule under the Hawaii statutes.

resulted in his conviction for attempted escape in the second degree on April 4, 1984. In addition to attempting escape, Plaintiff has committed such misconduct as assault, attempted assault on other inmates, and harassment and abuse of staff personnel. As a result of his predicated behavior, Plaintiff, considered a high custodial risk inmate, is incarcerated at HHSF which is, of necessity, the most restrictive prison in the state system. Plaintiff does not dispute or contest the reasons necessitating his actual transfer to HHSF.⁴

Based on the foregoing, the court rejects plaintiff's claim that placement in HHSF is punishment within the meaning of the Eighth Amendment.

d. Inmate Communication

Plaintiff objects to the R & R insofar as it recommends summary judgment in favor of defendants on the issue of the "English only" rule. Plaintiff claims it infringes on his free exercise of religion rights.

The rule prohibits inmates from conversing with each other in any language except English. Defendants contend that the rule is necessary to prevent entry of contraband, and checking for rumors of plans of escape,

⁴ Plaintiff concedes and admits, "Plaintiff does not challenge his transfer and placement 'at and within the Halawa High Security Facility,' as it is obviously apparent from Plaintiff's institutional file and from his criminal convictions that the high security facility is a proper place for inmates who pose such a threat to the community and to the prison environment." Opposition Memorandum at 4.

extortion, or of fights within the facility. Allowing such communication, defendants contend, would undermine prison security.

The rule states that "[i]nmates shall communicate in the English language only; including telephone calls, visits, and letters."

The U.S. Supreme Court has repeatedly held that prison regulations alleged to infringe constitutional rights are judged under a "reasonableness" test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights. *O'Lone v. Estate of Shabazz*, 482 U.S. 340, 347, 107 S.Ct. 2400, 2404 (1987); *Turner v. Safley*, 482 U.S. 78, 86-87, 107 S.Ct. 2254, 2260-2261 (1987); *Bell v. Wolfish*, 441 U.S. 520, 562, 99 S.Ct. 1861, 1886 (1979). When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is "reasonably related to legitimate penological interests." *O'Lone*, 482 U.S. at 347, 107 S.Ct. at 2404, (citing *Turner v. Safley*, 482 U.S. at 89, 107 S.Ct. at 2261). Moreover, the Supreme Court in *O'Lone* further articulated that a separate burden should not be placed on state prison officials to prove that "no reasonable method existed by which prisoners' religious rights could be accommodated without creating bona fide security problems." *Id.*, 482 U.S. at 351, 107 S.Ct. at 2405. Although the availability of alternatives is relevant to the reasonableness inquiry, the Supreme Court rejected the notion that "prison officials have to set up every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.*

This court finds that the regulation prohibiting Plaintiff from praying aloud in Arabic *together* with another inmate is valid as it is "reasonably related to legitimate penological interests." Being enforced for reasons pertaining to security interests, the regulation does not arbitrarily infringe upon Plaintiff's constitutional rights. Moreover, in *Johnson v. Moore*, 926 F.2d 921, 923 (9th Cir. 1991), the Ninth Circuit held that "[p]risons need only provide inmates a 'reasonable opportunity' to worship in accord with their conscience."

The regulation does not prohibit plaintiff from *individually* praying aloud in Arabic, or from praying with another inmate in English. Plaintiff has not asserted that praying aloud together with another individual *in Arabic* is a necessary and fundamental tenet of his religion. Cinda Sandin, Residency Section Supervisor at Halawa High Security Facility, attested that "Conner may pray quietly as required by his Muslim faith." (See affidavit of Cinda Sandin attached to Defendants' Motion for Summary Judgment filed November 20, 1989 at 4).

Thus, the "English-only" rule affords plaintiff a reasonable opportunity to worship pursuant to the *Johnson* test.

Plaintiff cites to the four-part test for determining whether a prison regulation is reasonably related to a legitimate penological interest in *Turner v. Safley*, 482 U.S. 78, 89-90, 107 S.Ct. 2254, 2261-62 (1987) for support of his contention that the "English-only" violates his rights to freedom of religion. The elements of the test are:

- (1) whether there is a valid, rational connection between the regulation and a legitimate and neutral government interest;
- (2) whether there are alternative means of exercising the asserted constitutional right that remain open to inmates;
- (3) whether and the extent to which the accommodation of the asserted right will impact the prison staff, inmates' liberty and prison resources; and
- (4) whether the regulation represents an exaggerated response to prison concerns in light of the ready availability of alternatives.

Johnson, 926 F.2d at 924 (citing *Turner v. Safley*, 482 U.S. 78, 89-90, 107 S.Ct. 2254, 2261-62 (1987)). However, as pointed out in *Iron Eyes v. Henry*, 907 F.2d 810, 813 (8th Cir. 1990), "[b]efore the *Turner* factors are applied to a prisoner's free exercise claim, the inmate must first establish the existence of a sincerely held religious belief, and that the challenged regulation infringes upon that belief."

As noted above, plaintiff has not established that praying in Arabic infringes upon the practice of his Muslim beliefs. Plaintiff is free to pray individually in Arabic, or jointly with other inmates in English. Plaintiff has not established that praying in Arabic is a tenet of the Muslim religion, and therefore such a prohibition does not infringe upon his beliefs.

The court rejects plaintiff's objection to the R & R on this issue.

e. Retaliation Claim

Plaintiff objects to the R & R insofar as it recommends granting defendants' motion and insofar as it holds that plaintiff's retaliation claim is vague and conclusory. Plaintiff claims he was retaliated against because of his status as a "jail-house lawyer." Plaintiff claims that his First Amendment rights are implicated. Objections, at 20 (citing *Bridges v. Russell*, 757 F.2d 1155 (11th Cir. 1985)). The gist of plaintiff's claim appears to be that defendants retaliate against plaintiff because plaintiff exercises his freedom of speech rights by being a jail-house lawyer. Plaintiff frames the issues as follows: Were "the actions of the named defendants done for the purpose of retaliating against plaintiff because of his choice to exercise his right to seek redress from government?" *Id.*

In connection with this claim, plaintiff takes exception to the Magistrate's finding that plaintiff's claim that he "held a virtual positive behavior since his arrival" at HHSF was false. Plaintiff points to his record at HHSF which indicates that he was cited for negative behavior only once. However, plaintiff, in his affidavit attached to his motion opposing defendants' motion states that he has accumulated "a collection of misconduct" while at HHSF. Conner affidavit ¶ 21.

Plaintiff claims that his record demonstrates good behavior. Even so, plaintiff claims he was denied advancement to more favorable phases of SMCP because of his jail-house lawyering. Plaintiff "believes he would be able to show that his record in H.H.S.F. . . . was better than those inmates who were advanced to the next higher level of" SMCP. Objection's [sic], at 24. However, plaintiff

provided no evidence substantiating this claim. He concedes that at this time he is not prepared to defend defendants' motion on this issue. *Id.*

Plaintiff attributes this dearth of evidence to the fact that he allegedly received no discovery. Plaintiff also requests additional time for discovery based on the "complexity" of this issue. However, the record indicates otherwise. Defendants were ordered by the Magistrate on November 7, 1989 to file responses to plaintiff's interrogatories by November 27, 1989. Defendants' motion for summary judgment was not filed until November 20, 1989. After defendants' filing, the record is devoid of evidence indicating that plaintiff requested or was denied discovery. Plaintiff has produced no evidence indicating that he was deprived of discovery.

The court rejects plaintiff's objections. Plaintiff filed the lawsuit on March 14, 1988. Defendants' motion for summary judgment was filed on November 20, 1989. Plaintiff had until January 2, 1990 to respond to the motion. There was an abundance of time for plaintiff to conduct discovery. As plaintiff admits, he has provided no evidence supporting his retaliation claims. Therefore, the court adopts the Magistrate's recommendation and grants summary judgment to defendants on this issue.

f. "Every Other Issue"

Plaintiff includes a "catch-all" provision where he objects to every remaining issue that the Magistrate recommends be decided in defendants' favor. Plaintiff provides no support for this objection. Rather, he complains

that he had insufficient time to prepare an adequate objection.

As noted previously, the court rejects plaintiff's claim regarding the amount of time this court granted plaintiff in which to file his objections. Therefore, this reason for failing to prepare a substantive objection to the remaining issues presented in the R & R is rejected. Moreover, upon review of the remaining issues, the court adopts the R & R and rejects the catch-all objection.

The court notes that with respect to the publishers-only rule, that such a rule is not per se reasonable because of *Bell v. Wolfish*, 441 U.S. 520 (1979), which held that such rules were constitutional. See *Johnson*, 926 F.2d at 923-25. However, in this case, the evidence indicates that plaintiff was entitled to order "hard-cover" books from publishers as well as from the library, and that the plaintiff is not required to donate the books to the state. Plaintiff has provided no evidence to prove he is being deprived of literature.

In addition, the court adds the following regarding the R & R's discussion of sovereign immunity. The defendants are not immune under the Eleventh Amendment to the extent plaintiff seeks to sue them in their official capacities for prospective injunctive relief.

In all other respects the court adopts the R & R, as plaintiff either has not produced evidence to substantiate such claims or has failed to argue the merits.

g. Issues Not raised in Summary Judgment

Plaintiff claims that there are other claims in this lawsuit that have not been disposed of by way of the motions. The court rejects this argument. Plaintiff was put on notice by defendants' motion that defendants sought to dispose of the entire lawsuit. For example, defendants stated that they sought "Summary Judgment in their favor in the above-entitled *action* on the ground that defendants are entitled to judgment in their favor as a matter of law." Defendants, Motion, cover page (emphasis added); *id.* at 20 ("The complaint should accordingly be dismissed.").

IV. CONCLUSION

Based upon the foregoing reasons, this court adopts the R & R granting defendants' motion for summary judgment, denying plaintiff's cross motion for summary judgment, and dismissing the complaint with prejudice.

DATED: Honolulu, Hawaii, SEP 30 1991.

/s/ Alan C. Kay
United States District Judge

DeMont R.D. Conner v. Theodore Sakai, et al.; Civil No. 88-0169 ACK; Order Adopting Magistrate's Report and Recommendation Granting Defendants' Motion for Summary Judgment.

APPENDIX "D"

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

DEMONT RAPAHHEL [sic]
DARWIN CONNER

V.

THEODORE SAKAI, et al

JUDGMENT
IN A CIVIL CASE

CASE NUMBER:
CIVIL
88-00169 ACK

(Filed Sept. 30, 1991)

— **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that the court adopts the Report and Recommendation granting Defendants' motion for summary judgment, denying Plaintiff's cross motion for summary judgment, and dismissing the complaint with prejudice.

September 30, 1991
Date

/s/ Walter A.Y.H. Chinn
Clerk WALTER
A.Y.H. CHINN

cc: all parties

(By) Deputy Clerk

APPENDIX "E"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DeMont R.D. Conner,)	No. 91-16704
Plaintiff-Appellant,)	D.C. No. 88-0169-
)	ACK
v.)	ORDER
Theodore Sakai et al.,)	(Filed
Defendants-Appellees.)	Feb. 25, 1994
_____)		

Before: BROWNING, NORRIS, AND REINHARDT, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX "F"

(Seal)

STATE OF HAWAII

DEPARTMENT OF
SOCIAL SERVICES
AND HOUSINGTITLE 17, ADMINISTRATIVE
RULES OF THE
CORRECTIONS DIVISION

INMATE HANDBOOK

OCTOBER 1983

[MATERIAL DELETED]

SUBCHAPTER 2
THE ADJUSTMENT PROCESS

§17-201-4 *General provisions.* The adjustment process tailors punishment for specific rule violations to the individual's training and treatment needs while maintaining facility order and ensuring respect for rules and the rights of others. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-5 *Rights, privileges, and responsibilities.* (a) The rights and privileges of all inmates and wards shall be as follows:

- (1) You may expect that as a human being you will be treated respectfully, impartially, and fairly by all personnel.
- (2) You shall be informed of the rules, procedures, and schedules concerning the operation of the institution.

- (3) You have the right to freedom of religious affiliation, and voluntary religious worship.
- (4) You will be provided health care which includes nutritious meals, proper bedding and clothing, a laundry schedule for cleanliness of the same, an opportunity to shower regularly, proper ventilation, regular exercise period, toilet articles, and medical and dental treatment.
- (5) You may reasonably correspond and visit with family members, friends, and other persons according to the rules and schedules of the facility where there is no threat to security, order, or correctional programming.
- (6) You may have access to the courts by correspondence on matters such as the legality of your conviction, pending criminal cases, or the conditions of your confinement.
- (7) You may utilize reading material for educational purposes and for your own enjoyment.
- (8) You have the right to participate in counseling, education, vocational training, employment, and other programs as far as resources are available and in keeping with your interests, needs, and abilities.

(b) The responsibilities of all inmates and wards shall be as follows:

- (1) You have the responsibility to treat others respectfully, impartially, and fairly.

- (2) You have the responsibility to know and abide by the rules, procedures, and schedules concerning the operation of the institution.
- (3) You have the responsibility to recognize, respect, and not interfere with the rights of others.
- (4) It is your responsibility to not waste food, to follow the laundry and shower schedule, to maintain neat and clean living quarters, and to seek medical and dental care as you may need it.
- (5) It is your responsibility to conduct yourself properly during visits, to not accept or pass contraband, and to not violate the law through your correspondence.
- (6) You have the responsibility to present to the court honestly and fairly your petitions, questions, and problems.
- (7) It is your responsibility to seek and utilize reading materials for personal benefit, without depriving others of their equal right to the use of this material.
- (8) You have the responsibility to take advantage of activities which may help you live a successful and law abiding life within the institution and in the community. You will be expected to abide by the regulations governing the use of such activities. [Eff. Oct. 6, 1983] (Auth: HRS §353-3 (Imp: HRS §353-3))

§17-201-6 *Prohibited acts within institutions of the division; greatest misconduct category.* (a) Acts constituting misconduct of the greatest category shall be as follows:

- (1) Sexual assault.
- (2) Killing.
- (3) Assaulting any person, with or without a dangerous instrument, causing bodily injury.
- (4) The use of force on or threats to a correctional worker or the worker's family.
- (5) Escape:
 - (A) From closed confinement, with or without threat of violence;
 - (B) From an open facility or program involving the use of violence or threat of violence.
- (6) Setting a fire.
- (7) Destroying, altering, or damaging government property or the property of another person resulting in damage of \$1,000 or more, including irreplaceable documents.
- (8) Adulteration of any food or drink which does or could result in serious bodily injury or death.
- (9) Possession or introduction of an explosive or ammunition.
- (10) Possession or introduction of any firearm, weapon, sharpened instrument, knife, or other dangerous instrument.
- (11) Rioting.
- (12) Encouraging others to riot.
- (13) The use of force or violence resulting in the obstruction, hindrance, or impairment

of the performance of a correctional function by a public servant.

- (14) Any lesser and reasonably included offense of the acts in paragraph (1) to (13).
- (15) Any other criminal act which the Hawaii Penal Code classifies as a class A felony.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

- (1) Disciplinary segregation up to sixty days.
- (2) Any other sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-7 *Prohibited acts; high misconduct category.* (a) Acts constituting misconduct of high category shall be as follows:

- (1) Fighting with another person.
- (2) Threatening another person, other than a correctional worker, with bodily harm, or with any offense against the other person or the other person's property.
- (3) Extortion, blackmail, protection: demanding or receiving anything of value in return for protection against others, to avoid bodily harm, or under threat of informing.
- (4) Assaulting any person without weapon or dangerous instrument.
- (5) Escape from an open institution or program, conditional release center, or work

release furlough which does not involve the use or threat of violence.

- (6) Attempting or planning escape.
- (7) Destroying, altering, or damaging government property or the property of another person resulting in damages between \$500-\$999.99.
- (8) Tampering with or blocking any locking device.
- (9) Adulteration of any food or drink which could or does result in bodily injury or sickness.
- (10) Possession of an unauthorized tool.
- (11) Possession or introduction or use of any narcotic paraphernalia, drugs, or intoxicants not prescribed for the individual by the medical staff.
- (12) Possession of any staff member's clothing or equipment.
- (13) Encouraging or inciting others to refuse to work or to participate in work stoppage.
- (14) The use of physical interference or obstacle resulting in the obstruction, hindrance, or impairment of the performance of a correctional function by a public servant.
- (15) Giving or offering any public official or staff member a bribe.
- (16) Any lesser and reasonably included offense of paragraphs (1) to (15).
- (17) Any other criminal act which the Hawaii Penal Code classifies as a class B felony.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

- (1) Disciplinary segregation up to thirty days.
- (2) Any other sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-8 *Prohibited acts; moderate misconduct category.*

(a) Acts constituting misconduct of moderate category shall be as follows:

- (1) Engaging in sexual acts.
- (2) Making sexual proposals or threats to another.
- (3) Indecent exposure.
- (4) Wearing a disguise or a mask.
- (5) Destroying, altering, or damaging government property or the property of another person resulting in damages between \$50-\$499.99.
- (6) Theft.
- (7) Misuse of authorized medication.
- (8) Possession of unauthorized money or currency.
- (9) Loaning of property or anything of value for profit or increased return.
- (10) Possession of anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate or ward through regular institutional channels.

- (11) Refusing to obey an order of any staff member.
- (12) Violating a condition of any community release or furlough program.
- (13) Unexcused absence from work, or other authorized assignment.
- (14) Failing to perform work as instructed by a staff member.
- (15) Lying or providing false statements, information, or documents to a staff member, government official, or member of the public.
- (16) Counterfeiting, or unauthorized reproduction of any document, article, or identification, money, security, or official paper.
- (17) Participating in an unauthorized meeting or gathering.
- (18) Being in an unauthorized area.
- (19) Failure to follow safety or sanitary rules.
- (20) Using any equipment or machinery which is not specifically authorized.
- (21) Using any equipment or machinery contrary to instructions or posted safety standards.
- (22) Failing to stand count.
- (23) Interfering with the taking count.
- (24) Making intoxicants or alcoholic beverage.
- (25) Being intoxicated.
- (26) Gambling.

- (27) Preparing or conducting a gambling pool.
- (28) Possession of gambling paraphernalia.
- (29) Being unsanitary or untidy; failing to keep one's person and one's quarters in accordance with posted safety standards.
- (30) Unauthorized contacts with the public or other inmates.
- (31) Giving money or anything of value to or accepting money or anything of value from an inmate or ward, a member of the inmate's or ward's family, or friend.
- (32) Any lesser and reasonably included offense of paragraphs (1) to (31).
- (33) Any other criminal act which the Hawaii Penal Code classifies as a class C felony and misdemeanor.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

- (1) Disciplinary segregation up to fourteen days.
- (2) Any sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-9 *Prohibited acts; low moderate misconduct category.* (a) Acts constituting misconduct of low moderate category shall be as follows:

- (1) Destroying, altering, or damaging government property, or the property of another person resulting in damage less than \$50.

- (2) Possession of property belonging to another person.
- (3) Possessing unauthorized clothing.
- (4) Malingering, feigning an illness.
- (5) Using abusive or obscene language to a staff member.
- (6) Smoking where prohibited.
- (7) Tattooing or self mutilation.
- (8) Unauthorized use of mail or telephone.
- (9) Correspondence or conduct with a visitor in violation of rules.
- (10) Any lesser and reasonably included offense of paragraphs (1) to (9).
- (11) Any other criminal act which the Hawaii Penal Code classifies as a petty misdemeanor.
- (12) Harassment of employees.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

- (1) Disciplinary segregation up to four hours in cell.
- (2) Monetary restitution.
- (3) Any sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-10 *Prohibited acts; minor misconduct category.*

(a) Acts constituting misconduct of minor category shall

be any criminal act which the Hawaii Penal Code classifies as a violation.

(b) Sanctions which may be imposed as punishment for acts in subsection (a) shall include one or more of the following:

- (1) Loss of privileges (i.e., community recreation; commissary; snacks; cigarettes, smoking; personal visits – no longer than fifteen days; personal correspondence; personal phone calls for not longer than fifteen days).
- (2) Impound inmate's personal property.
- (3) Extra duty.
- (4) Reprimand.

(c) Attempting to commit any of the above acts, aiding another person to commit any of the above acts, and conspiring to commit any of the above acts shall be considered the same as a commission of the act itself. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-11 *Minor misconduct; Adjustments.* (a) A minor rule violation is defined as that which poses no serious threat to the safety, security, or welfare of the staff, other inmates or wards, or the institution or subjects the individual to the imposition of lesser penalties. Such misconduct may be punished by a staff member designated by the facility administrator who did not make the charge against the inmate or ward. The staff member shall inform the inmate or ward that the individual is accused of committing a minor infraction, to which the individual shall be given a brief opportunity to respond, to offer an explanation in defense, or otherwise show that

the individual is not guilty of the alleged misconduct. The following sanctions may be imposed:

- (1) Loss of privileges; e.g., community recreation; commissary; snacks, cigarettes; smoking; personal visits no longer than fifteen days; personal correspondence no longer than fifteen days; personal phone calls.
- (2) Impound inmate's or ward's personal property.
- (3) Extra duty.
- (4) Reprimand.

(b) The officer shall prepare a brief written report to be given to and placed in the individual's file, indicating the infraction, the sanction, and the date or dates the sanction is to be or was carried out. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-12 *Serious misconduct.* A serious rule violation is defined as that which poses a serious threat to the safety, security, or welfare of the staff, other inmates or wards, or the institution and subjects the individual to the imposition of serious penalties such as segregation for longer than four hours. Such misconduct shall be punished through the adjustment committee pursuant to the procedures in sections 17-201-13 to 17-201-20. [Eff. Oct. 6, 1983] (auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-13 *Adjustment committee.* The adjustment committee shall be normally composed of at least three members who are not actually biased against the inmate or ward. A small facility may designate one person to act

in the capacity of the adjustment committee. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-14 *Pre-hearing detention.* An inmate or ward may be detained for a reasonable time pending an adjustment committee hearing if, in the judgment of the facility administrator, detention is necessary:

- (1) To protect life or limb;
- (2) For the security or good government of the facility;
- (3) To protect the community;
- (4) For any other good reason. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-15 *Pre-hearing investigation.* (a) A staff member may conduct a complete investigation into the facts of the alleged misconduct to determine if there is probable cause to believe the inmate or ward committed misconduct. If the staff member finds sufficient cause to believe that a rule violation has occurred, the adjudication procedures may be initiated. Additionally, the pre-hearing investigator may present the evidence against the inmate or ward to the adjustment committee.

(b) The implementation of a pre-hearing investigation shall be within the facility administrator's discretion. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-16 *Notice.* (a) The inmate or ward shall receive prior notice that an adjustment committee hearing will be held regarding the individual.

(b) Within a reasonable time, not less than twenty-four hours before the hearing, the charged inmate or

ward shall be served with written notice of the time and place of the adjustment committee hearing, what the specific charges are, including a brief notation of the facts. If the inmate or ward waives the twenty-four hour period, the waiver shall be reduced to writing and signed by the inmate or ward on the face of the notice.

(c) The inmate or ward or counsel substitute shall have the opportunity to review all relevant non-confidential reports of misconduct or a summary of the details thereof during the period between the notice and the hearing.

(d) The misconduct report or summary shall briefly contain the following:

- (1) The specific rule violated;
- (2) The facts supporting the charge;
- (3) Any unusual inmate or ward behavior;
- (4) Any staff or inmate or ward witnesses; the disposition of any physical evidence (e.g., weapons); and
- (5) Any immediate action taken. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-17 *Hearing*. (a) The inmate or ward has a right to appear at the adjustment committee hearing, except where institutional safety or the good government of the facility would be jeopardized. If the individual is excluded from the hearing, reasons shall be given in writing. If the inmate or ward declines to attend the hearing, it shall be held regardless of the inmate's or ward's absence.

(b) The committee shall explain the reason for the hearing and the nature of the charge or charges against the inmate or ward. The inmate or ward shall plead guilty or not guilty to the charges. Failure to plead shall be accepted as a plea of not guilty.

- (1) A plea of guilty eliminates the need to consider other evidence against the inmate or ward who shall then be given an opportunity to explain the actions or offer evidence in mitigation.
- (2) A plea of not guilty necessitates the consideration of evidence against the inmate or ward.

(c) The inmate or ward shall be advised of the right to remain silent, but that silence may be used as a permissible inference of guilt. An inmate or ward cannot, however, be compelled to testify against oneself without the granting of immunity and may not be required to waive that immunity.

(d) Formal rules of evidence shall not apply. The committee may rely on any form of evidence, documentary, or testimonial, that it believes is reliable.

(e) Confrontation and cross examination:

- (1) The inmate or ward may be given the privilege to confront and cross examine adverse witnesses.
- (2) The committee may deny confrontation and cross examination and identification of adverse witnesses if in its judgment such a confrontation would:

- (A) Subject the witnesses to potential reprisal;
- (B) Jeopardize the security or good government of the facility;
- (C) Be unduly hazardous to the facility's safety or correctional goals; or
- (D) Otherwise reasonably appear to be impractical or unwarranted.

- (3) If confrontation and cross examination and identification of adverse witnesses are denied, the committee is encouraged to enter in the record of the proceeding and make available to the inmate or ward an explanation for the denial. Additionally, the inmate or ward may be given an oral or written summary of the confidential evidence against the individual and provided an opportunity to respond.

(f) The inmate or ward shall be given an opportunity to respond to evidence against the inmate or ward, explain the alleged misconduct, or offer evidence of mitigation.

- (1) The inmate or ward should be permitted to call witnesses and present evidence of defense as long as it will not be unduly hazardous to institutional safety or correctional goals.
- (2) The committee may deny the inmate's or ward's calling of certain witnesses or presentation of certain evidence, after being given an offer of proof as to the nature of the evidence, for reasons such as:

- (A) Irrelevance;
- (B) Lack of necessity;
- (C) The hazards presented in individual cases; or
- (D) Any other justifiable reason.

In this regard, the committee may keep the hearing within reasonable limits and refuse the presentation of evidence or the calling of witnesses, keeping in mind the right of the inmate or ward to be heard. The committee is encouraged to state the reason for the refusal.

(g) An inmate or ward shall be permitted to employ counsel substitute. A counsel substitute shall be a member of the facility staff who did not actively participate in the process by which the individual was brought before the committee or, in the facility administrator's discretion, a sufficiently competent inmate or ward designated by the facility staff. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-18 *Findings.* (a) The inmate or ward has a right to be apprised of the findings of the adjustment committee.

(b) Upon completion of the hearing, the committee may take the matter under advisement and render a decision based upon evidence presented at the hearing to which the individual had an opportunity to respond or any cumulative evidence which may subsequently come to light may be used as a permissible inference of guilt, although disciplinary action shall be based upon more than mere silence. A finding of guilt shall be made where:

- (1) The inmate or ward admits the violation or pleads guilty.
- (2) The charge is supported by substantial evidence.

(c) - The inmate or ward shall be given a brief written summary of the committee's findings which shall be entered in the case file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken. The findings may properly exclude certain items of evidence if necessitated by personal or institutional safety and goals; the fact that evidence has been omitted and the reason or reasons therefor must be set forth in the findings. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-19 *Punishment*. (a) The adjustment committee may render sanctions commensurate with the gravity of the rule and the severity of the violation. Corporal punishment is prohibited, provided that physical force may be employed for self defense or defense of others, to maintain the immediate order and security of the prison, to remove an inmate or ward pursuant to a lawful order, or any other reason demanded by the exigencies of institutional safety and correctional goals. The following types of punishment may be rendered by the adjustment committee:

- (1) Temporary loss of privileges.
- (2) Segregation or confinement not longer than sixty days, provided that a longer period may be imposed with the expressed written approval of the corrections division administrator, and the committee shall review the

inmate's or ward's confinement at least once every thirty days.

- (3) Any other punishment deemed necessary by the adjustment committee.

(b) The committee may also refer the matter to the program committee for further action. A description of the basic living levels of disciplinary confinement shall be as provided in subsections (c) to (h).

(c) The quarters used for segregation should be ventilated, adequately lighted, and maintained in a sanitary condition by the inmate or ward at all times. Normally, a segregated inmate or ward should be entitled to clothing, and bedding. If an inmate or ward is likely to destroy the clothing or bedding, injure oneself, or create a disturbance detrimental to others, or for other good reasons, materials may be removed from the cell until the condition which prompted removal subsides.

(d) Segregated inmates or wards shall be given an adequately nutritious diet.

(e) Segregated inmates or wards shall maintain an acceptable level of personal hygiene.

(f) Each segregated inmate or ward should be permitted indoor or outdoor exercise, unless security or institutional government dictates otherwise.

(g) Personal property will ordinarily be impounded, inventoried, and receipted.

(h) Normally, religious and legal materials are permitted. However, inmates or wards may be denied all reading and legal materials during temporary confinement for not longer than fifteen days. Access to legal

materials shall be permitted if an inmate or ward demonstrates the need for the materials and for prompt access to the courts in preparation of a habeas corpus petition or other application for relief. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-20 *Review.* (a) Each inmate or ward has the right to seek administrative review of the decision of the disciplinary hearing officer or adjustment committee through the grievance process. Review shall be initiated within fourteen calendar days of the day of receipt of the committee's decision.

(b) The facility administrator may also initiate review of any adjustment committee decision and it shall be within the administrator's discretion to modify any committee findings or decisions. The administrator may demand any matter to the adjustment committee for further hearing or rehearing if the administrator believes it to be in the interest of justice. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

APPENDIX "G"

Department of Social Services and Housing
Corrections Division

MISCONDUCT REPORT

Facility HHSF

Prepared on: 8-13-87

TO: MARIANO, Eugene ACO VI
(Watch Supervisor)

FROM: FURTADO, Gordon ACO III
(Name, title - Reporting Officer)

RE: X CONNER, Demont SSN: _____
(Name of Violator) (ID Number)

FACTS CONCERNING THE MISCONDUCT:

(Give time occurred/discovered, rule(s) violated, location, what happened and time the incident ceased or was corrected.)

On Thu. Aug. 13, 1987 at approx. 0900 hrs. I ACO G. FURTADO while on duty in Module A along with ACO R. AHUNA escorted INMATE D. CONNER from his cell (quad II) to the module program area. At this time I informed Inmate CONNER to move against the wall to be strip-searched before leaving the module. Inmate CONNER then stripped, faced the wall and squatted. I then asked Inmate CONNER to put both hands on the wall and lift up both feet one at a time to which he did with no incident.

I then asked him to step back, bend over and with both hands spread his buttocks so that I could check for contraband in the rectal area to which he said "Fuck!" in an angry tone of voice. This part of the search was thus

completed, but as Inmate CONNER turned around and faced this writer he stared at me and stated "Why are you harassing me?" I informed him that I'm just following a routine procedure. He then stated in a very sarcastic voice "What you got something personal against me! Why you harassing me?" I then told him all you have to do is just listen and follow what I tell you to do but Inmate CONNER just kept on making sarcastic remarks about being harassed and the way that this writer was doing his job.

At this time because of the tense atmosphere and also the very provoking attitude towards this writer, Sgt. SUMMERS who witnessed this incident cancelled Inmate CONNER's privilege of religious counselling. Inmate CONNER was then escorted back to his cell by this writer and ACO D. COELHO.

It should be noted that as Inmate CONNER went through the strip search procedures he moved very slow and questioned every move as if trying to hinder the search, hoping that this writer might overlook a certain area. Inmate CONNER appeared to be very unruly in his attitude towards this writer.

It appears that Inmate D. CONNER is in violation of CD rules sec. 17-201-7 #14 & 16, 17-201-9 #5 & #12.

INVESTIGATION: (by supervisor - statements of violator, witness(es))

On Friday, 8/14/87 at approximately 1935 hrs. this writer interviewed inmate CONNERS concerning an alleged misconduct. CONNERS was apprised of his constitutional rights and the charges against him.

CONNERS claims that he did not swear at ACO FURTADO and did not disobey any order given by ACO FURTADO, CONNERS claims that ACO FURTADO was unreasonable in the strip search procedure and that ACO FURTADO did not show him (CONNERS) any respect. CONNERS also feels that the staff treats inmates like dogs when they are being stripped and humiliates inmates.

At that time I explained to inmate CONNERS that ACO FURTADO was only following orders in his (ACO FURTADO's) strip searching techniques and that all inmates are to be searched in the same manner.

Subsequently, I talked to ACO FURTADO concerning the incident and from ACO FURTADO's testimony the search was conducted properly in a professional manner. As a result of this investigation there appears to be probable cause that inmate CONNERS may be in violation of the DSSH Inmate Handbook/Rules And Regulations and that this matter be referred to the adjustment committee.

R. JOHNSON, ACO IV, HCF
/s/ R. Johnson

FINDINGS:

☐ Guilty

☐ Not Guilty

☒ Referred to Adjustment Committee

A64

CHARGE(S)	RULE #
17-201-7 The use of physical interference or obstacle resulting in the obstruction, hindrance, or impairment of the performance of a correctional function by a public servant.	14 & 16
17-201-9 Using abusive or obscene language to a staff member.	5
17-201-9 Harassment of employees.	12

INFORMAL ADJUSTMENT BY SUPERVISOR:

☐ Withdrawal of: _____
(specify)

☐ Extra Work assigned

☐ Confinement

PERIOD OF CORRECTIVE ACTION:

_____ hours, OR

Beginning _____ . _____
(time) (day)

and ending _____ . _____

BY: _____
(Name, supervisor)

(Title) DATE: _____

A65

STATE OF HAWAII
Department of Social Services and Housing
Corrections Division

Facility HHSF
Conner, Demont
(Name) (Number)

NOTICE OF REPORT OF MISCONDUCT

Date Aug. 25, 1987 Time 1200 hrs.
(Date)

• You are herein notified that a written report of misconduct was filed against you on Aug. 13, 1987. A copy of the charge(s) are listed below.

• A hearing on the charge(s) has been scheduled and you are to be present at HHSF PBHR,
(Location)

0900 hrs., on Aug. 28, 1987.
(Time) (Date)

As required by Corrections Division procedure, this hearing has been scheduled to determine the facts and administer just corrective action. You have the right to: 1) Have any charge explained to you; 2) Question those who have made any charge against you and examine any written material concerning the charge; 3) Explain any charge brought against you; 4) Request an administrative review through the adjustment process.

Charge(s): 17-201-7 (14) & (16); The use of physical interference or obstcale [sic] resulting in the obstruction, hindrance, or impairment of the performance of a correctional funtion [sic] by a public servant.

A66

17-201-9 (5); Using abusive or obscene language to a staff mmember [sic].

17-201-9 (12); Harassment of employees.

Facts supporting the charge(s) are as stated on the attached Misconduct Report.

/s/ Cinda Sandin
Chairman

Receipt of notice of charges and rights:

I acknowledge receipt of the above charges. I understand that I: may ___ / may not X, have legal counsel present at the hearing. I also understand that I have 24 hours notice prior to the hearing.

I do ___ I do not X waive legal counsel.

I do ___ I do not X waive my right to 24 hour prior notice.

Date: 8/25/87 Signature: /s/ Demont R.D. Conner
(Resident)

Findings and Disposition of Corrective Action: FINDINGS: The Adjustment Hearing was held 8/28/87. The Committee consisted of UM Cinda Sandin (Chairman), SW Carolyn Corley and ACO Shook. The inmate pled not guilty to the three charges. The inmate was found not guilty of 17-201-7(14) & (16)

DISPOSITION: 17-201-7 (14 & 16) 30 days disciplinary segregation.
17-201-9(5) 4 hours disciplinary segregation concurrent

A67

17-201-9(12) 4 hours disciplinary segregation concurrent

17-201-7(14 & 16) charges are expunged. NOT GUILTY ON BOTH COUNTS. The segregation period will run from 8/31/87 to 9/29/87.*

Evidence relied upon for decision: The Committee based their decision upon the inmate's statements that during the strip search procedure he turned around after squatting and looked at the ACO. He was then directed to "spread his cheeks" by ACO Furtado as part of the new strip search procedure. He felt angry, humiliated and apprehensive. He then "eyed up" ACO Furtado and was hesitant to comply. He further indicated that he dislikes ACO Furtado and feels he should not work on the module. The inmate admitted saying the word "fuck" during the procedure. The Committee also reviewed the submitted reports. Witnesses were unavailable due to move to the medium facility and being short staffed on the modules.

/s/ Cinda Sandin
Committee Chairman

8/31/87
Date

Receipt of findings and disposition:

/s/ Demont R.D. Conner
Inmate

8/31/87
Date

* [This exhibit reflects the ultimate disposition of the charges. Conner was originally found guilty of all charges lodged against him.]

ORIGINAL

ORIGINAL

No. 93 - ¹⁹¹¹~~1191~~

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

CINDA SANDIN, Unit Team Manager,
Halawa Correctional Facility,
Petitioner,

vs.

DEMONT R.D. CONNER, et. al.,
Respondents.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

MOTIONS FOR LEAVE TO PROCEED IN FORMA
PAUPERIS AND FOR PERMISSION TO FILE
BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI OUT OF TIME

Paul L. Hoffman
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(310) 260-9585

Attorneys for Respondent

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SEP 8 1994

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Respondent Demont R.D. Conner moves the Court under Rule 39 for permission to proceed in forma pauperis. Attached to this motion is an affidavit prepared by Respondent indicating that he does not have the funds to hire an attorney to respond to the pending Petition. Respondent's counsel is informed and believes that Respondent has appeared pro se throughout the proceedings in this case to date and was previously granted leave to proceed in forma pauperis in the courts below.

Respondent also seeks permission to file his Opposition to the Petition for a Writ of Certiorari out of time. By the time Respondent was able to obtain the services of Paul L. Hoffman on a pro bono basis, the deadline for filing his Opposition had already expired. As set forth in his Affidavit, Respondent was unable, due to his rehabilitation and other prison commitments, to file the Opposition in a timely manner.

For these reasons, Respondent requests permission to proceed in forma pauperis and to file his Opposition brief submitted with these Motions. This Opposition is submitted at the same time as an Opposition filed in Harper v. Mujahid, No. 94-43, a case

involving similar issues regarding Hawaii prison regulations. Respondent Mujahid is also represented on a pro bono basis by Paul L. Hoffman.

Dated: September 6, 1994

Respectfully submitted,



PAUL L. HOFFMAN
Counsel of Record for
Respondent Conner

MR. DE MONT R.D. CONNER
HALAWA CORRECTIONAL FACILITY
99-902 MOANALUA RD.
AIEA, HAWAII 96701

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

CINDA SANDIN,
PETITIONER,
vs.

No. 93-1911
AFFIDAVIT IN SUPPORT FOR
APPOINTMENT OF COUNSEL

DE MONT R.D. CONNER, ET AL.,
RESPONDENTS.

AFFIDAVIT IN SUPPORT FOR APPOINTMENT OF COUNSEL

I, DE MONT R.D. CONNER, DO HEREBY AVER UNDER THE PENALTY OF
PERJURY THAT:

1. I AM THE RESPONDENT IN THE ABOVE ENTITLED ACTION
AND THAT I MAKE THIS AFFIDAVIT IN GOOD FAITH.
2. DUE TO MY CURRENT REHABILITATIONAL PROGRAMMING AND
WORK COMMITMENTS, I AM UNABLE TO FILE ANY ADEQUATE PAPERS ON
MY BEHALF TO RESPOND TO THE PETITIONER IN THIS ACTION.
3. I DO WANT TO BE HEARD IN THIS ACTION, BASED UPON
THE PETITIONERS' MISCONSTRUCTION OF THE FACTS AND LAWS IN THIS
ACTION.

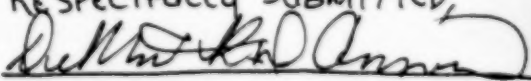
4. BASED UPON THE FACT THAT THE DEFENDENTS IN
MUJAHID V. HARPER, ET AL., HAD FILED FOR CERTIORARI BEFORE THIS
COURT, AND THAT BOTH THE CASES ARE RELATED, RESPONDENT CONNER
SEEKS TO HAVE MR. PAUL L. HOFFMAN, ESQ., OF THE LAW OFFICES OF
PAUL L. HOFFMAN, 100 WILSHIRE BOULEVARD, SUITE 1000, SANTA MONICA,
CALIFORNIA 90401-1198, TO REPRESENT ME IN THIS CASE BEFORE THIS COURT.

5. I AM ONLY AGREEING AT THIS TIME TO ALLOW MR. HOFFMAN
TO PREPARE AN OPPOSITION TO THE PENDING PETITION AND, IF THE PETITION IS
GRANTED, TO REPRESENT ME IN FURTHER PROCEEDINGS ON THE MERITS IN THIS
COURT.

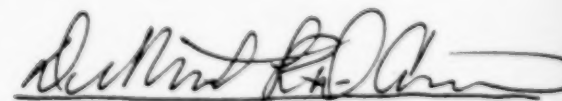
6. I HAVE NO FUNDS TO COVER THE COURT COSTS AND ATTORNEY
FEES IN THIS CASE.

FURTHER AFFIANT SAYETH NAUGHT.

DATED: HONOLULU, HAWAII, JULY 18, 1994.

RESPECTFULLY SUBMITTED,

MR. DE MONT R.D. CONNER

I DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE
AND CORRECT.


DE MONT R.D. CONNER

ORIGINAL

No. 93 - 1191

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

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On Petition For a Writ of Certiorari
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For The Ninth Circuit

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

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Attorneys for Respondent

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SEP 8 1994

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION PRESENTED

1. Whether Hawaii's prison regulations created in plaintiff-respondent constitutionally protected "liberty interests" in not being arbitrarily placed in disciplinary segregation and whether these rights were implicated in the prison disciplinary proceedings over which petitioner presided?

2. Whether the Ninth Circuit was correct in deciding that material issues of fact precluded the entry of summary judgment on Respondent's claim that the Due Process Clause of the Fourteenth Amendment requires that inmates be allowed the right to call witnesses at a prison disciplinary hearing regarding the imposition of administrative segregation?

3. Whether in the state of the record the Ninth Circuit was correct in deciding that Petitioner was not entitled to qualified immunity for refusing to permit Respondent to call witnesses at his disciplinary hearing?

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October Term, 1994

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On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

Respondent, Demont R.D. Conner, submits this brief in
opposition to the Petition for Writ of Certiorari filed by Cinda
Sandin, Unit Team Manager, Halawa Correctional Facility.

STATEMENT

Respondent Demont R.D. Conner is an inmate housed at Halawa
High Security Facility in Hawaii. This case arises out of an
incident on August 13, 1987, in which Respondent was accused of
misconduct in the context of a body cavity search conducted by
prison officials at the Halawa prison facility. Based on the
report of the prison guard responsible for this search Respondent
was charged with misconduct and brought before an "adjustment
committee" established under Hawaii law, on August 28, 1987.
Though Respondent requested the opportunity to present witnesses
to contest these charges at the August 28, 1987, hearing, this
request was denied because "witnesses were unavailable due to
[the] move to the medium facility and being short staffed on the
modules." [Pet. App. at A8]. After the hearing, Respondent was
subjected to disciplinary segregation by the adjustment committee
chaired by Petitioner Sandin.¹

Respondent filed a pro se complaint alleging violations of
his constitutional rights under 42 U.S.C. § 1983 as a result of
the disciplinary segregation. The complaint also raised a
variety of other issues. The Petition before this Court
concerns only Respondent's claim that he was denied Due Process

¹ Though Petitioner urges this Court to find that Respondent
confessed to facts establishing misconduct, this issue is not
before the Court in the context of this Petition. Petitioner does
not claim, nor could she, that Respondent admitted his guilt within
the relevant state regulations.

because Petitioner Sandin denied him the right to call witnesses at the August 28, 1987, disciplinary hearing.²

In September 1991 the District Court granted summary judgment against Respondent on all of his claims. On February 2, 1994, the Ninth Circuit issued an Order³ reversing the summary judgment in part. The February 2, 1994, Order affirms the dismissal of all of Respondent's claims with two exceptions, including the issue presented in the Petition.

The Ninth Circuit found that Respondent had a liberty interest grounded in Hawaii law and protected by the Due Process Clause of the Fourteenth Amendment in being free from disciplinary segregation. Under Hawaii law Respondent could be subjected to disciplinary segregation only if he admitted his guilt of infractions specified in Hawaii law or an adjustment committee found "substantial evidence" of his guilt. [Pet. App. 57-58]

The Ninth Circuit made the further finding that Respondent was entitled, absent an adequate justification by the adjustment

² The State of Hawaii did not challenge the portion of the Ninth Circuit's opinion that struck down the application of a prison rule barring communication in a language other than English to Islamic prayers. [Pet. 9].

³ The Ninth Circuit initially issued its Order reversing summary judgment in part on June 2, 1993. The panel granted a Petition for Rehearing and issued its Amended Order on February 2, 1994. The case was submitted to the panel on the record without oral argument. Respondent has always represented himself in these proceedings until present Counsel agreed to handle any proceedings in this Court on a pro bono basis.

committee, to call witnesses on his behalf at the August 28, 1994, hearing and that this right was "clearly established" at least since this Court's decision in Wolff v McDonnell, 418 U.S. 539, 567-69 (1974). Based on Respondent's declaration stating that Petitioner Sandin was responsible for denying his request to call witnesses on his behalf the entry of summary judgment by the District Court as to her was in error.

The Ninth Circuit remanded the case for further proceedings and specifically indicated that the District Court could revisit the issue of qualified immunity on a more complete factual record. The Ninth Circuit found that it was not possible to determine "without a fuller development of the record" whether a reasonable official could have believed that the denial of Respondent's request to call witnesses was lawful.

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT WARRANT REVIEW BECAUSE THE NINTH CIRCUIT CORRECTLY APPLIED THIS COURT'S PRECEDENTS IN FINDING THAT HAWAII'S PRISON REGULATIONS CREATE A LIBERTY INTEREST IN REMAINING FREE FROM DISCIPLINARY SEGREGATION

This Court has consistently held that a "state law may create enforceable liberty interests in the prison setting."⁴

⁴ This Court has held in a variety of settings that prison regulations granted inmates a protected liberty interest in parole, Board of Pardons v. Allen, 482 U.S. 369 (1987); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979), in good-time credits, Wolff v. McDonnell, 418 U.S. 539, 556-572 (1974).

Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 461 (1989). Whether state law creates such a liberty interest enforceable under the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. section 1983 must be determined by examining "closely the language of the relevant statutes and regulations" Id. The Ninth Circuit's opinion followed this approach in determining that the Hawaii prison regulations at issue in this case created a liberty interest in being free from disciplinary segregation unless a showing of specific misconduct was shown by "substantial evidence."

In Hewitt v. Helms, 459 U.S. 460, 472 (1983) this Court held that a prisoner who was subject to administrative segregation had a protected liberty interest created under Pennsylvania law. In Hewitt this Court found that the Pennsylvania procedures at issue in that case created a liberty interest in being free from administrative segregation because the state provision "used language of an unmistakably mandatory character, requiring that certain procedures "shall", "will" or "must" be employed...and that administrative segregation will not occur absent specified substantive predicates--viz., 'the need for control' or the threat of a serious disturbance." Id. The case before this Court is similar in that Hawaii's prison regulations are sufficiently mandatory to create a protected liberty interest in a prisoner. As the Ninth Circuit pointed out:

Under Title 17, subtitle 2 (Corrections Division), Department of Social Services and Housing, § 17-201-18(b), the inmate must admit guilt or the prison disciplinary

committee must be presented with substantial evidence before the committee may make a finding of guilt. If the inmate does not admit guilt, or the committee does not find substantial evidence, the particular outcome - freedom from disciplinary segregation - must follow. § 17-201-18(b). [Pet. App. A4]

This regulation clearly states that if the certain substantive predicates which are laid out do not occur then disciplinary segregation may not be imposed. In particular, the adjustment must find a prisoner guilty of special offenses before imposing administrative segregation. This state scheme falls squarely within Hewitt v. Helms and thus there is no reason to revisit this issue by granting the Petition.

Petitioner's primary contention is that this Court's decision in Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 461 (1989) somehow forecloses the finding of a protected liberty interest in these circumstance. However, this Court derived its test in Kentucky Department of Corrections from its holding in Hewitt and expressly reaffirmed Hewitt. The Court stated first that a statute must contain "substantive predicates" or "particularized standards to govern official decision making. Next, the Court stated that the regulation must require in "explicitly mandatory language" that if the substantive predicates are met a particular outcome must follow. Id. at 1909-1910.

In Kentucky Department of Corrections, this Court found that the regulation restricting prisoner visitor privileges at issue in that case "lack[ed] the requisite relevant mandatory language

since visitors "may", but need not, be excluded whether they fall within one of the categories of excludable visitors." Id. at 454. Thus, this Court found that the state regulations were not the kind that created expectations of enforcement sufficient to create a liberty interest in certain forms of visitation.

Petitioner contends that Hawaiian prison regulations at issue in this case are more like the regulations in Kentucky Department of Corrections than the regulations in Hewitt. In particular, Petitioner argues that these regulations are not sufficiently mandatory because they stop short of requiring that a particular result be reached upon a finding that the "substantive predicates" are met because prisoners may not be assigned to segregation even after a finding of guilt.

However, the Ninth Circuit was correct in finding that Hawaii law creates a liberty interest in being free from the imposition of administrative segregation unless the prisoner admits his guilt of specific misconduct defined substantially in state regulations [Pet.App A43-50] or has been found guilty based on "substantive evidence." There is nothing discretionary about these requirements. Administrative segregation may not be imposed unless these substantive predicates are met. Thus, this case falls squarely within Hewitt v. Helms and is not the kind of discretionary visitation regulation at issue in Kentucky Department of Corrections.

II.

THE NINTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

Petitioner argues that the Ninth Circuit's holding conflicts with the holdings of other Circuits in similar cases. In particular, Petitioner claims that Burgin v. Nix, 899 F.2d 733 (8th Cir. 1990) and Woods v. Thieret, 903 F.2d 1080 (7th Cir. 1990), are in conflict with the Ninth Circuit's holding in this case.

In Burgin the issue was whether a prisoner had a liberty interest in eating a "non-sacked" meal as opposed to a nutritionally similar and adequate "sacked" meal. Id. at 734. The Burgin Court never reached the analysis required in Hewitt and Kentucky Department of Corrections but found that there was essentially no difference between "sacked" and "non-sacked" meals that triggered any kind of due process analysis. Id. at 734-735.

Indeed, the Burgin court emphasized that there were no Iowa statutes or regulations guaranteeing that prisoners would receive a specific type of meal. Id. at 735. Under Iowa regulations prisoners who were placed on incorrigible inmate status may be served "sacked" meals "in some cases" and thus the regulations, unlike the regulations at issue in this case, did not have the explicitly mandatory language required under this Court's cases to establish a liberty interest in freedom from "sacked" lunches based on particular mandatory substantive prerequisites. Id.

Nor is the Seventh Circuit's holding in Woods v. Thieret, 903 F.2d 1080 (7th Cir. 1990), in conflict with the decision below. In Woods, a prison inmate challenged three separate "lockdowns" in his cell. The regulations at issue in Woods provided for a disciplinary hearing and possible temporary confinement status based on three criteria. The Seventh Circuit found that these regulations were not sufficiently mandatory under the principles in Kentucky Board of Corrections and Hewitt to create a "liberty interest" of the kind asserted by the prisoner in that case. Id. at 1083. The regulations in Woods were completely different from the regulations at issue in this case. In Woods, the Seventh Circuit held that "while the rules mandate who shall make the determinations and what shall be considered (the three substantive predicates), they do not mandate any particular outcome." Id. Thus, the Illinois regulations considered in Woods did not create any mandatory substantive standards to be found before temporary confinement could be ordered by prison officials. The key difference in this case is that the Hawaii regulations at issue create clear, mandatory substantive predicates before prison officials may impose disciplinary segregation.

There is no conflict between the Ninth Circuit's holding in this case and the holdings in Burgin or Woods. In each case the court applied this Court's analysis in Hewitt and Kentucky Department of Corrections and came to different conclusions because of the different statutory schemes involved.

III.

**THE NINTH CIRCUIT PROPERLY DETERMINED THAT
DEPENDANT WAS NOT ENTITLED TO QUALIFIED
IMMUNITY ON THE RECORD BELOW**

Petitioner contends that the Ninth Circuit has erred in not granting immunity to Petitioner. However, the Ninth Circuit was correct in deciding that Wolff v. McDonnell, 418 U.S. 539, 556 (1974), clearly established Respondent's right to call witnesses at prison disciplinary hearings.⁵

It must be emphasized that the Ninth Circuit was reviewing a grant of summary judgment. As the court below stated "[w]hether a reasonable official could have believed his actions in denying Conner the requested witnesses were lawful is a matter that cannot be decided without a fuller development of the record." [Pet. App. A9]. For this reason alone, the qualified immunity issue advanced by Petitioner is an especially weak candidate for review by this Court.

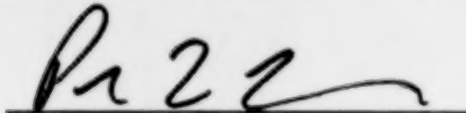
⁵ Petitioner's citation to Elder v. Holloway, 114 S.Ct. 1019 (1994) is puzzling [Pet. 21]. There is no decision not considered by the District Court or Ninth Circuit that calls for the application of Elder.

CONCLUSION

For all of these reasons the Petition should be denied.

DATED: September 6, 1994

Respectfully submitted,



PAUL L. HOFFMAN
Counsel of Record for
Respondent Conner

ORIGINAL

No. 94-43

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CINDA SANDIN, Unit Manager,
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For the Ninth Circuit

CERTIFICATE OF SERVICE

RECEIVED

SEP 8 1994
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SUPREME COURT, U.S.

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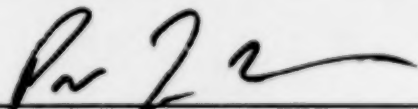
I certify that a copy of the Motions For Leave To Proceed In Forma Pauperis and for Permission To File Brief In Opposition to Petition for Writ of Certiori Out of Time has been sent to counsel for petitioner by U.S. mail, first class, postage prepaid, on September 6, 1994 at the following address:

Steven S. Michaels
Girard D. Lau
Deputy Attorneys General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Santa Monica, California on September 6, 1994.

LAW OFFICES OF PAUL L. HOFFMAN



PAUL L. HOFFMAN
Attorney for Respondents
Demont R.D. Conner

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In The
Supreme Court of the United States

October Term, 1994

CINDA SANDIN, *Unit Team Manager,*
Halawa Correctional Facility,

Petitioner,

vs.

DeMONT R.D. CONNER, *et al.,*

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX
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Petition For Certiorari Filed May 26, 1994
Certiorari Granted October 7, 1994

1997

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Mar 14	1	COMPLAINT (42 U.S.C. § 1983)
	2	Application to Proceed in Forma Pauperis, Supporting Documentation and Order - Referred to Tokairin
Apr 11	3	ORDER Granting In Forma Pauperis Application cc: all parties of record TOKAIRIN
	14	Summons in a Civil Action Summons issued
	19	Summons in a Civil Action Summons Issued
	28	Return of Service - served Cinda Sandin thru cert mail. RRR 4-27-88
	7	Petition for Writ of Habeas Corpus; Access to Law Library - referred to Conklin
May 3	8	Process Receipt and Return - Served Civil Action to Defendant Oku on 4/26/88 by certified Mail RRR: 4/27/88
	9	AMENDED COMPLAINT
	10	Motion for Temporary Restraining Order and/or Preliminary Injunction; Brief in Support of Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction - On Behalf of Plaintiff - Referred to Tokairin

11 Petition for Writ of Habeas Corpus ad Testificandum; Order Granting Writ - On Behalf of Plaintiff - Referred to Tokairin
 6 12 Return of Service - served Theodore Sakai on 5-4-88
 10 13 Summons in a Civil Action Summons Issued
 14 Summons in a Civil Action Summons Issued
 15 Summons in a Civil Action Summons Issued
 23 16 ANSWER to Amended Complaint; Certificate of Service - On Behalf of Defendants
 Jun 14 17 Return of Service - served Leonard Gansalves thru Harold Falk on 5-31-88
 18 Return of Service - served Harold Falk on 5-31-88
 19 Return of Service - served Lawrence Shohet thru Harold Falk on 5-31-88
 15 20 Certificate of Service on behalf of pltf
 21 Petition for Writ of Habeas Corpus for Temporary Restraining Order and/or Preliminary Injunction; Order; Certificate of Service on behalf of pltf - referred to Tokairin
 22 Plaintiffs Brief in Support of Complaint and Amended Complaint; Affidavit of DeMont R.D. Conner in Support of Plaintiffs Brief in Support of Complaint and Amended Complaint; Certificate of Service - referred to Tokairin

21 23 Letter from pltf - referred to Tokairin
 Jul 21 24 ORDER Granting Writ of Habeas Corpus Ad Testificandum - the Motion for Preliminary Injunction set for 8/26/88 @2:00 Tokairin - cc: all counsel **TOKAIRIN**
 25 25 ORDER from 9th CCA - petition for writ of mandamus is ordered filed without prepayment of fees and is hereby DENIED cc: all parties of record
 Aug 8 26 Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction; Exhibit "A": Affidavit of Cinda Sandin; Certificate of Service - On Behalf of Defendants
 18 27 Plaintiff's Memorandum in Reply to Defendants Opposition to Plaintiffs Motion for a Preliminary Injunction; Certificate of Service
 24 28 Writ of Habeas Corpus Ad Testificandum - Plaintiff to appear on 8/26/88 @ 2:00 p.m. Tokairin - cc: all counsel - warrant Issued **TOKAIRIN**
 26 EP: Motion for a Preliminary Injunction - GRANTED in part and DENIED IN PART (No Court Reporter) **TOKAIRIN**
 Sep 6 29 Report Recommending Partial Granting of Motion for Preliminary Injunction - court recommends that the motion for preliminary injunction be granted in part and denied in part to give Conner the access to courts in the manner that has been adopted by the courts in this district cc: all parties of record **TOKAIRIN**

13	30	Plaintiff's Proposed Order for Preliminary Injunction; Affidavit of DeMont R.D. Conner; Certificate of Service
	31	Motion for Reconsideration of in Part Denial of Plaintiff's Preliminary Injunction; Affidavit of DeMont R.D. Conner; Certificate of Service - On Behalf of Plaintiff - Referred to Tokairin
19	32	Plaintiff's Objection to Magistrate's Report Recommendation; Certificate of Service - Referred to Kay
26	33	Ex Parte Motion for Temporary Restraining Order - referred to Tokairin
	34	Motion for Temporary Restraining Order; Affidavit of DeMont R.D. Conner; Certificate of Service - referred to Tokairin
Nov 8	35	Motion for Leave to File an Amended Complaint - On Behalf of Plaintiff - Referred to Tokairin
Dec 2	36	ORDER Adopting Magistrate's Report Recommending Partial Granting of Motion for Preliminary Injunction of September 6, 1988 cc: all parties of record KAY
<u>1989</u>		
Jan 3	37	Motion to Compel Production of Documents and Answer Plaintiff's First Set of Interrogatories - referred to Tokairin
Feb 2	38	Motion for Ordering of a Pre Trial Scheduling conference; Certificate of Service On Behalf of Plaintiff - Referred to Tokairin
7	39	Motion for Order to Show Cause on alleged Contempt for Violation of Preliminary Injunction; Affidavit of DeMont R.D.

		Conner; Certificate of Service - On Behalf of Plaintiff - referred to Tokairin
	40	Affidavit of DeMont R.D. Conner - on behalf of Plaintiff - referred to Tokairin
8	41	Motion for Extension of Time; Affidavit of DeMont R.D. Conner; Certificate of Service on behalf of Plaintiff - referred to Tokairin
15	42	Motion for Leave to File an Amended Complaint; Amended Complaint; Certificate of Service
16	43	Motion for Temporary Restraining Order and/or Preliminary Injunction; Brief in Support of Motion; Affidavit of DeMont R.D. Conner; Exhibits "2 thru "; Certificate of Service - On Behalf of Plaintiff - Referred to Tokairin
Feb 23	44	Motion for a Preliminary Injunction; Memorandum of Law; Affidavit of DeMont R.D. Conner; Certificate of Service
	45	Motion for Preliminary Injunction; Memorandum of Law; Affidavit of DeMont R.D. Conner; Certificate of Service - referred to Tokairin
Mar 3	46	Motion for a Preliminary Injunction; Memorandum of Law; Affidavit of DeMont R.D. Conner; Certificate of Service
	47	Motion for a Preliminary Injunction; Memorandum of Law; Affidavit of DeMont R.D. Conner; Certificate of Service

- 8 48 Motion for an Order to Show Cause; Affidavit of DeMont R.D. Connor - On Behalf of Plaintiff - Referred to
- 49 Motion for a Preliminary Injunction; Memorandum of Law; Affidavit of DeMont R.D. Conner; Exhibits "a to b"; Certificate of Service - On Behalf of Plaintiff - Referred to Tokairin
- 21 50 Notice of Motion to Modify Preliminary Injunction; Motion to Modify Preliminary Injunction; Memorandum in Support of Motion to Modify Preliminary Injunction; Exhibits "A"-and "B"; Certificate of Service - 3/30/89 @ 9:00 a.m. Kay On Behalf of Defendants
- 51 Ex Parte Motion for Order Shortening Time for Hearing on Defendants' Motion to Modify Preliminary Injunction; ORDER Shortening Time for Hearing on Defendants' Motion to Modify Preliminary Injunction - On Behalf of Defendants KAY
- 22 52 Certificate of Service - On Behalf of Plaintiff
- 30 EP: Defendant's Motion to Modify the Preliminary Injunction Order is GRANTED. The court will modify the injunction by allowing Defendant to maintain in his cell two legal materials and four inches of legal papers. Defendant's witness: Cinda Sandin CST (YI) KAY
- Apr 6 53 Motion for a Preliminary Injunction; Memorandum of Law; Affidavit of DeMont R.D. Conner; Certificate of Service - referred to Tokairin

- 13 54 Motion for Preliminary Injunction; Memorandum of Law; Affidavit of DeMont R.D. Connor; Certificate of Service - referred to Tokairin
- May 2 55 Amended Notice of Preliminary Injunctions; Affidavit of DeMont R.D. Conner; Certificate of Service; Page (4) - On Behalf of Plaintiff - Referred to Tokairin
- 26 56 ORDER Regarding Various Motions and Trial Setting - Motion to Amend the Complaint is GRANTED. Motion to Compel Discovery is DENIED without Prejudice. Non Jury Trial 2/8/90 @ 9:00. Motions filed, Discovery noticed 11/20/89. Pre Trial statements 12/21/89. Final Pre Trial 1/7/90 @ 9:00 a.m. Disclose names and addresses of Expert Witnesses Plaintiff 9/6/89, Defendant 9/13/89. Simultaneous exchange of experts reports 10/9/89. Deposition of expert witnesses 10/31/89. - cc: all counsel TOKAIRIN
- Jun 23 57 Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction; Exhibit "A"; Certificate of Service - on behalf of Defendants
- Jul 6 58 Plaintiff's Reply Memorandum to Defendants Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction; Affidavit of DeMont R.D. Conner; Exhibits "o1" thru "61"; Certificate of Service
- Aug 17 59 Motion for an Order to Show Cause why the Defendants Should Not Be Held in Contempt for Violating Paragraph "B" of Page 4 of the Preliminary Injunction Filed

December 2, 1988; Affidavit of DeMont R.D. Conner; Affidavit of Terry Smith; Exhibits "A" thru "K"; Certificate of Service - On Behalf of Plaintiff Referred to Kay

Sep 8 60 AMENDED COMPLAINT cc: pltf for service to USM
 9 61 Summons in a Civil Case Summons issued
 13 62 Motion to Compel Answer to Interrogatories and Production of Documents; Memorandum of Law; Exhibits "A" thru "B"; Certificate of Service - On Behalf of Plaintiff - Referred to Tokairin
 14 63 ORDER of Designation to a Magistrate - as to Plaintiff's Motion for Order to Show Cause Why Defendants Should Not Be held in Contempt for violating page 4 ¶ B of Preliminary Injunction filed 12/2/88 filed on 8/17/89 - cc: all counsel KAY
 18 64 ORDER Regarding Response Date for Defendants to File Their Responsive Memorandum to Plaintiff's Motion to Compel Answers to Interrogatories and Production of Documents - on or before October 13, 1989 cc: All parties of record CONCKLIN
 Oct 12 65 Memorandum in Opposition to Motion for an Order Compelling Discovery; Exhibit A; Certificate of Service on behalf of defts
 16 66 Letter - dated October 3, 1989 to Magistrate Tokairin - on behalf of Tokairin
 31 67 Process Receipt and Return - Served Complaint to William Summers on 10/17/89

68 Process Receipt and Return - Served Complaint to William Paaga on 10/15/89
 69 Process Receipt and Return - Served Complaint to Leonard Gonsalves on 10/13/89
 70 Process Receipt and Return - Served Complaint to Kim Marie Thorburn M.D. On 10/12/89
 71 Process Receipt and Return - Served Complaint to Francis Sequeira thru supervisor on 10/12/89
 72 Process Receipt and Return - Served Complaint to Harold Falk thru secretary on 10/13/89
 73 Process Receipt and Return - Served Complaint to Dept of Corrections - Mr. Harold Falk thru secretary on 10/13/89
 74 Process Receipt and Return - Served Complaint to William Oku thru administrator on 10/17/89
 75 Process Receipt and Return - Served Complaint to Cinda Sandin on 10/24/89
 76 Process Receipt and Return - Served Complaint to Gordon Furtado on 10/16/89
 Oct 31 77 Process Receipt and Return - Served Complaint to Robert Johnson on 10/23/89
 78 Process Receipt and Return - Served Complaint to Theodore Saki on 10/23/89
 79 Process Receipt and Return - Served Complaint to Abraham Lota on 10/16/89
 Nov 2 80 Notice - Final Pre Trial reset from 1/7/90 to 1/5/90 @ 9:00 a.m. Tokairin. Non Jury

Trial reset from 2/8/90 to 2/6/90 @ 9:00
 Kay - cc: all counsel

7 81 ORDER Regarding Plaintiff's Discovery
 Requests and Other Matters - Defendants
 to file a response to Plaintiff's Motion for
 OSC by 11/27/89. Defendants to file
 answer to interrogatories or their motion
 by 11/27/89 - cc: all counsel **TOKAIRIN**

82 ANSWER to Amended Complaint; Certifi-
 cate of Service - On Behalf of Defendants

20 83 Motion for Summary Judgment; Notice;
 Memorandum in Support of Summary
 Judgment; Affidavit of Cinda Sandin;
 Exhibits "A" through "K"; Certificate of
 Service On Behalf of Defendants

27 84 Memorandum in Opposition to Plaintiff's
 Motion for an Order to Show Cause Why
 Defendants Should Not be Held in Con-
 tempt for Violating Paragraph "B" of Page
 4 of the Preliminary Injunction Filed
 December 2, 1988; Affidavit of Cinda
 Sandin; Exhibit "A"; Certificate of Service

85 ORDER Setting Deadline for Opposing
 Memoranda - pltf shall file response to
 M/Summary Judgment by 1-2-90. Failure
 to file the appropriate papers will result in
 the grant of defts' motion cc: all parties of
 record **TOKAIRIN**

28 85 Process Receipt And Return - Complaint
 Served by USM via U.S. Mail - 10-25-89

Dec 19 86 Certificate of Service on behalf of Defen-
 dant

21 87 Defendants' pre-trial statement; certificate
 of service

1990
 Jan 4 88 Motion to Dismiss; Affidavit of DeMont
 R.D. Conner; Certificate of Service - On
 Behalf of Plaintiff - Referred to Tokairin

89 ORDER Continuing Final Pre Trial Confer-
 ence Pending Ruling on Motion for Sum-
 mary Judgment - trial date vacated. Dates
 will be reset upon a ruling on Defendants'
 Motion for Summary Judgment - cc: all
 counsel **TOKAIRIN**

8 90 Opposition to Defendants Motion for
 Summary Judgment with Cross-Motion
 for Summary Judgment; Memorandum in
 Support of Opposition; Affidavit of
 DeMont R.D. Conner; Exhibits "A"
 through "G"; Certificate of Service - On
 Behalf of Plaintiff - Referred to Tokairin

16 91 Process Receipt and Return - Served Lau-
 rence Shohet, Dept of Corrections -
 UNSERVED

92 Process Receipt and Return - Served
 Edward Marshal, Halawa Correctional
 Facility UNSERVED

24 93 Rebuttal Memorandum to Plaintiff's
 Opposition to Defendants' Motion for
 Summary Judgment With Cross-Motion
 for Summary Judgment; Certificate of Ser-
 vice

Feb 12 94 Sirrebuttal Memorandum to Defendant's
 Rebuttal Memorandum to Plaintiff's
 Opposition to Defendants' Motion for
 Summary Judgment with Cross-Motion
 for Summary Judgment; Exhibit "A"; Cer-
 tificate of Service - On Behalf of Plaintiff

- Apr 19 95 Letter requesting for intervention re: violation of the Order adopting magistrate's report and recommendation filed on 12/2/88 - On Behalf of Plaintiff
- 24 96 ORDER Regarding Plaintiff's Letter of April 12, 1990 - pltf's request denied cc: all parties of record **TOKAIRIN**
- May 15 97 Plaintiff's Objection to Magistrates Order Denying Plaintiff's Request for a Contempt Hearing; Affidavit of DeMont R.D. Conner; Exhibits "A"; Certificate of Service - referred to Kay
- June 4 98 ORDER Affirming Magistrate Tokairin's Order Regarding Plaintiff's Letter of April 12, 1990 cc: all parties of record **KAY**
- Jul 13 99 Letter Dated 7/3/90 Re: Preliminary Injunction (Law Library) - referred to Kay
- 27 100 ORDER of Designation to a Magistrate **KAY** [OSC for Violation of Preliminary Injunction designated to Mag. Conklin] cc: all parties
- Aug 16 101 ORDER of Designation to A Magistrate - Magistrate Bert S. Tokairin is designated to hear: Order to Show Cause for Violation of Preliminary Injunction. cc: All Parties of Record **KAY**
- 31 102 ORDER Setting Forth Response Time - (Defendants shall file a reponse [sic] to Order to Show Cause by 9/24/90) cc: All Parties of Record **TOKAIRIN**
- Sep 24 1003 Defendants' Response to August 29, 1990 Order to Show Cause; Declaration of Janice Neilson; Declaration of Shelley

- Nobriga; Declaration of Cinda Sandin; Declaration of Davis Ho; Declaration of Carl Zuttermiester; Declaration of Jacob M. Merrill; Exhibits A-K; Certificate of Service
- Oct 2 104 Motion for Shortening of Time for a Hearing to be Held on Plaintiff's Motion for and Order to Show Cause Why Defendants Should Not Be Held in Contempt for Violating Preliminary Injunction of December 2, 1988; Affidavit of DeMont R.D. Conner; Exhibit "A"; Certificate of service - On Behalf of Plaintiff Referred to Tokairin
- 1991
Jan 3 105 Report Re: Plaintiff's Order to Show Cause Why Defendants Should Not Be Held in Contempt for Violating Judge Kay's 1988 Preliminary Injunction - be DENIED - cc: all counsel **TOKAIRIN**
- Mar 4 106 Request to stay all the proceedings - referred to Kay
- May 14 107 ORDER Denying Plaintiff's Request to Stay Proceedings - cc: all counsel **KAY**
- 15 108 ORDER Adopting Magistrate's Report and Recommendation - That Plaintiff's Order to Show Cause Why the Defendants should not be held in Contempt and Plaintiff's Motion for Shortening of Time for a Hearing on the Order to Show Cause is hereby DENIED. cc: All parties of record **KAY**
- 20 109 Proposed Report and Recommendation Granting Defendants' Motion for Summary Judgment On Behalf of Defendants

- 21 110 Report and Recommendation Granting Defendants' Motion for Summary Judgment - the Complaint is DISMISSED with Prejudice - On Behalf of Defendants **TOKAIRIN**
- 31 111 Motion for Extension of Time to File Objection to Magistrates Report and Recommendation - referred to Kay - on behalf of Plaintiff
- Jun 3 112 ORDER partially Granting Plaintiff's Motion for Extension of Time to File Objection to Magistrate's Report and Recommendation - Objection be filed no later than 6/10/91 cc: All parties of record **KAY**
- 18 113 Objection to Magistrate's Report and Recommendation; Affidavit of DeMont R.D. Conner; Certificate of Non-Service - on behalf of plttff - referred to Kay
- Sep 18 114 EP: Order to Show Cause - Defendant's Motion for Summary Judgment is being considered by Judge Kay. Hearing continued to 12/19/91 @ 9:30 (ESR-KKO) **PENCE**
- 30 115 ORDER Adopting Magistrate's Report and Recommendation Granting Defendants' Motion for Summary Judgment **KAY** cc: all parties [Court adopts R&R and dismisses the complt with prejudice]
- 116 JUDGMENT in a Civil Case - **CHINN** [court adopts the R&R granting Defendants' Motion for Summary Judgment, denying Plaintiff's cross motion for Summary Judgment, and dismissing the complt with prejudice] cc: all parties

- Oct 16 117 **NOTICE OF APPEAL; Certificate of Service (By Plaintiff) (CA 91-16704)**
- 23 Notice of Appeal sent to Clerk, 9th CCA & to all counsel
- 1992
May 5 Original Record mailed Federal Express to 9th CCA - (CA 91-16704)
- 1994
Mar 21 EO: Received from 9th CCA Original Clerk's record in 3 volumes (Called - will look for volume 4) RECEIVED from 9th CCA - volume 4
- 30 118 JUDGMENT - 9th CCA - AFFIRMED in part, REVERSED in part, and REMANDED - Browning, Norris and Reinhardt - cc: all counsel, Dottie and Kay
-

DOCKET ENTRIES CA9 NO. 91-16704

Conner v. Sakai

- 11/5/91 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL AND PRO SE. Setting schedule as follows: appellant's designation of RT is due 10/28/91; appellee's designation of RT is due 11/7/91; appellant shall order transcript by 11/18/91; court shall file transcript in DC by 12/18/91; certificate of record shall be filed by 12/26/91; appellant's opening brief is due 2/3/92; appellees' brief is due 3/4/92; appellants' reply brief is due 3/18/92; [91-16704] (sm)
- 1/13/92 Filed Appel'at DeMont R.D. Conner's document entitled "ex parte petition for writ [sic] of mandamus w/exh's. CRIMAT [91-16704] 2055294] [91-16704] (vt)
- 3/16/92 Filed order (James R. BROWNING, Charles E. WIGGINS): Apl't's "ex parte petition for writ of amndamus [sic]," filed Jan. 13, 1992, is construed as a motion for injunctive relief. So construed [sic], the motion is denied. Apl't may file a new action in the district court if he desires the relief requested in the motion for injunction relief. Apl't's opening brief and excerpts of record were due Feb. 2, 1992. To date, apl't has not filed his opening brief nor move for an ext of time. Apl't's opening brief and excerpts of record are now due April 13, 1992; aple's brief is due May 13, 1992; the optional reply brief is due May 27, 1992. Failure to comply with this order man [sic] result in the dismissal of this appeal for failure to prosecute. 9th Cir. R. 42-1. [91-16704] (vt)

- 4/17/92 Received Appellant DeMont R.D. Conner's brief in 7 copies 5 pages w/attachments (Informal: y) deficient late and no excepts: Served on 4/10/92 Ref/PROMO [91-16704] (vt)
- 5/1/92 Filed order (Deputy Clerk: 1p) The court is in receipt of the apl't's informal opening brief with attachments that appear to be portions of the Excerpt's [sic] of record. The Excerpts of record requirement is waived. The opening brief is ordered filed. The clerk of the district court is requested to forward the clerk's record and any reporter's transcripts within 10 days of the entry of this order. The answering brief remains due May 13, 1992. The optimal reply briefj [sic] is due 14 days from service of the answering brief. A copy of this order shall be provided to the district court clerk. [91-16704] (vt)
- 5/1/92 Filed original and 7 copies Appellant DeMont R.D. Conner opening brief (Informal: Y) 5 pages. served on 4/10/92 [91-16704] (vt)
- 5/6/92 Filed certified record on appeal in 4 Vols. (total): 4 Clerks Rec 0 RTs (ORIG) [91-16704] [91-16704] (vt)
- 5/14/92 Filed motion & clerk order (lp) Aples' motion for an ext of time in which to file the answering brief is granted. The answering brief is due June 6, 1992. No further ext of time ot [sic] fiel [sic] this brief will be granted, etc., The optional reply brief is due 14 days from service of the answering brief. (Motion recvd 5/6/92) [91-16704] (vt)

- 6/3/92 Filed original and 15 copies appellee Theodore Sakai's 24 pages brief. served on 6/1/92 [91-16704] (vt)
- 6/22/92 Filed original and 7 copies DeMont R.D. Conner reply brief, (Informal: y) 7 pages; served on 6/16/92 [91-16704] (vt)
- 8/21/92 Calendar check performed [91-16704] (dd)
- 9/8/92 Calendar materials being prepared. [91-16704] [91-16704] (dd)
- 9/10/92 CALENDARED: Hawaii Nov. 5, 1992 9:00 a.m. Courtroom Intermediate Court of Appeals [91-16704] (dd)
- 9/29/92 Sent Rule 34-4 letter. Case to be submitted on briefs on 11/5/92 [91-16704] (dd)
- 11/5/92 SUBMITTED ON THE BRIEFS TO: James R. BROWNING, William A. NORRIS, Stephen R. REINHARDT. [91-16704] (jmr)
- 6/2/93 FILED OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED (Terminated on the Merits after Submission Without Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. James R. BROWNING; William A. NORRIS; Stephen R. REINHARDT, author.) FILED AND ENTERED JUDGMENT. 4.5 MEMO SENT TO SR RE: COSTS [91-16704] (ck)
- 6/16/93 [2372705] Filed original and 40 copies Appellee Theodore Sakai petition for rehearing with suggestion for rehearing en banc. (PANEL and ALL ACTIVE JUDGES.) 15 p. pages, served on 6/15/93 [91-16704] (rei)

- 6/29/93 Filed order (James R. BROWNING, William A. NORRIS, Stephen R. REINHARDT): Pursuant to general order 4.5(e); each [sic] side is to bear it's own costs. [91-16704] (rei)
- 2/2/94 Filed amended opinion (Judges James R. BROWNING, William A. NORRIS, Stephen R. REINHARDT) [91-16704] (rei)
- 2/25/94 Filed order (James R. BROWNING, William A. NORRIS, Stephen R. REINHARDT): The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. [91-16704] (rei)
- 3/25/94 MANDATE ISSUED [91-16704] (jr)
- 6/7/94 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 93-1911 filed on 5/26/94. [91-16704] (crw)
- 10/18/94 Filed Supreme Court order granting certiorari. PANEL (SC Date: 10/7/94) [91-16704] (crw)
-

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

<u>DeMONT RAPHEAL</u>)	CIVIL NO.
<u>DARWIN CONNER</u>)	<u>88-00169 ACK</u>
(Enter above the full name of)	
the plaintiff in this action))	COMPLAINT
vs.)	(42 U.S.C. §1983)
)	
<u>THEODORE SAKAI,</u>)	
<u>WILLIAM OKU, CINDA</u>)	
<u>SANDIN, IN THEIR INDIVIDUAL</u>)	
<u>AND OFFICIAL CAPACITIES,</u>)	
_____)	

(Filed Mar. 14, 1988)

I. Previous Lawsuits

- A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment? Yes(✓) No()
- B. If your answer to A is yes, describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit

Plaintiffs DeMONT R. D. CONNER
Defendants HAROLD FALK, DIRECTOR OF
CORRECTIONS DIVISION,
WILLIAM OKU, ADMINISTRA-
TOR OF HALAWA HIGH SECU-
RITY FACILITY.

2. Court (if federal court, name the district, if state court, name the county)

DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION (CIVIL)

3. Docket number NONE
4. Name of judge to whom case was assigned
HONORABLE FREDRICK J. TITCOMB
5. Disposition (for example: Was case dismissed? Was it appealed? Is it still pending?)
D.C. DISMISSED
6. Approximate date of filing lawsuit MARCH
2, 1988
7. Approximate date of disposition D.C.
MARCH 3, 1988

II. Place of Present Confinement HALAWA HIGH
SECURITY FACILITY

- A. Is there a prisoner grievance procedure in this institution? Yes(✓) No()
- B. Did you present the facts relating to your complaint in the state prisoner grievance procedure? Yes(✓) No()
- C. If your answer is YES,
1. What steps did you take? ALL THREE STEPS
(INCLUDING OMBUDSMAN)
2. What was the result? AFFIRMATIVE
- D. If your answer is NO, explain why not -N/A-
- E. If there is no prison grievance procedure in the institution, did you complain to prison authorities? Yes() No()

F. If your answer is YES,

1. What steps did you take? -N/A-
2. What was the result -N/A-

III. Parties

In item A below, place your name in the first blank and place your present address, in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of Plaintiff DeMONT R.D. CONNER

Address 99-902 MOANALUA HWY. AIEA,
HAWAII 96701

(In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.)

B. Defendant THEODORE SAKAI, is employed as ADMINISTRATOR, at CORRECTIONS DIVISION,

C. Additional Defendants WILLIAM OKU, ADMINISTRATOR HALAWA HIGH SECURITY FACILITY, CINDA SANDIN, UNIT TEAM MANAGER, HALAWA HIGH SECURITY FACILITY,

IV. Statement of Claim

(State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and place. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheets if necessary.)

1. ON AUGUST 28, 1987, PLAINTIFF WAS SUMMONED TO THE INSTITUTIONS PAROLE BOARD HEARING/INTERVIEW ROOM TO FACE CHARGES ON AN ALLEGED MISCONDUCT CHARGES OF WHICH MS. CINDA SANDIN SAT AS THE CHAIRMAN. 2. IT WAS IN THIS HEARING THAT I WAS DENIED THE RIGHT TO QUESTION THE ADULT CORRECTIONAL OFFICER WHO WROTE ME UP. 3. I WAS DENIED TO RIGHT TO REVIEW THE SUBMITTED REPORTS CONCERNING THESE CHARGES. 4. I WAS DENIED THE OPPORTUNITY TO CALL (STAFF) WITNESSES ON MY BEHALF. 5. I WAS DENIED THE OPPORTUNITY TO CALL (STAFF) WITNESSES WHO WERE PRESENT AT THE ALLEGED INCIDENT. 6. I FILED AN INMATE COMPLAINT/GRIEVANCE FORM AT ALL THREE STEPS CONTESTING THE CONVICTION OF THE ABOVE MENTIONED AND OTHER GROUNDS OF WHICH MR. OKU'S REPRESENTATIVE AND MR. SAKAI (DEFENDANTS(CC)) FAILED TO RENDER RELIEF. I'VE ALSO NOTIFIED THE OMBUDSMAN'S OFFICE, AND SO I SUFFERED 30 DAYS ILLEGAL CONFINEMENT AND ENDED UP DOING (6) SIX WHOLE MONTHS OF TERROR, BOTH PHYSICAL AND MENTAL ANGUISH.

V. Relief

(State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.)

PLAINTIFF PRAYS THAT THIS HONORABLE COURT WILL MAKE A DECLATORY JUDGMENT, AND AWARD PLAINTIFF MONETARY DAMAGES SUCH AS: \$10,000 COMPENSATORY FROM EACH DEFENDANT, AND \$10,000 PUNITIVE FROM

EACH DEFENDANT, PLUS REASONABLE ATTOR-
NEY FEE'S AS THIS COURT DEEMS FIT.

Signed this 10th day of March, 1988.

/s/ DeMont R. D. Conner
Signature of Plaintiff

IN THE UNITED STATE DISTRICT COURT FOR THE
DISTRICT OF HAWAII

[Caption Omitted In Printing]

ORDER GRANTING IN FORMA
PAUPERIS APPLICATION

(Filed Apr. 11, 1988)

Plaintiff Conner filed an application to proceed in forma pauperis on March 14, 1988. After due consideration of plaintiff's application, the request to proceed in forma pauperis is granted subject to certain conditions.

The court notes that to proceed in forma pauperis is a privilege, not a right. *Jefferson v. U.S.A.*, 277 F.2d 723 (9th Cir. 1960). The granting or refusing of that privilege is a matter committed to the sound discretion of the court. *Smart v. Heinze*, 347 F.2d 114 (9th Cir. 1965).

In the present case, Mr. Conner has approximately \$152.00 in his prison account and no other assets at present. Mr. Conner's financial status justifies his request to proceed in forma pauperis.

Mr. Conner's complaint challenges the procedure in a disciplinary hearing where he alleges that he was denied the right to question a correctional officer, to review reports submitted on the charges, or to call witnesses on his behalf. This Court is required to review complaints by pro se litigants liberally and provide such parties with notice of the deficiencies. *Noll v. Carlson*, 809 F.2d 1446 (9th Cir. 1987). There is an important distinction for due process purposes between disciplinary procedures which are required for major misconduct and those procedures which are required to impose lesser penalties. *Wolff v.*

McDonnell, 418 U.S. 539 (1976); *Baxter v. Palmigiano*, 425 U.S. 308 (1976). Plaintiff should therefore provide the Defendants with a description of the nature of the disciplinary proceeding which is the subject of this complaint.

IT IS HEREBY ORDERED that Plaintiff's application to proceed in forma pauperis is GRANTED.

DATED: Honolulu, Hawaii, APR 11, 1988.

/s/ Bert S. Tokairin
UNITED STATES
MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

MOTION FOR LEAVE TO FILE
AMENDED COMPLAINT

(Filed May 3, 1988)

PLAINTIFF DeMONT R.D. CONNER, PURSUANT TO RULES 15(a) AND 19(a) OF THE FEDERAL RULES OF CIVIL PROCEDURES, REQUEST LEAVE TO FILE AN AMENDED COMPLAINT ADDING THREE PARTIES AS DEFENDANTS.

1. PLAINTIFF IN HIS ORIGINAL COMPLAINT NAMED THREE DEFENDANTS AS THE PERSONS WHOM HAD VIOLATED HIS CONSTITUTIONAL RIGHTS.

2. SINCE THE FILING OF THE COMPLAINT, THE PLAINTIFF HAS DETERMINED THAT THE ADDED DEFENDANTS ARE ALSO RESPONSIBLE FOR THE ARBITRARY ACTIONS THAT WAS [sic] TAKEN AGAINST HIM WHILE CONFINED IN SPECIAL HOLDING FOR THE AFOREMENTIONED SIX MONTHS. (SEE ORIGINAL COMPLAINT)

3. THIS COURT SHOULD GRANT LEAVE FREELY TO AMEND A COMPLAINT, SEE: *FOMAN V. DAVIS* 1371 U.S. 178.83 S.CT.227 (1962)

AMENDED COMPLAINT

4. DEFENDANT HAROLD FALK A RESIDENT OF THE STATE OF HAWAII, IS THE DIRECTOR OF CORRECTIONS DIVISION OF WHICH OVERSEES AND HAS

JURISDICTION OF HALAWA HIGH SECURITY FACILITY AND HALAWA CORRECTIONAL FACILITY (HEREIN AFTER H.H.S.F. AND H.C.F. RESPECTIVELY) SAID DEFENDANT IS HELD LIABLE BY KNOWLEDGE AND ACQUIESCENCE.

5. DEFENDANT LAWRENCE SHOHET, A RESIDENT OF THE STATE OF HAWAII, IS THE DEPUTY ADMINISTRATOR OF H.H.S.F AND H.C.F SAID DEFENDANT IS HELD LIABLE IN HIS CAPACITY BY KNOWLEDGE AND ACQUIESCENCE

6. DEFENDANT LEONARD GONSALVES, A RESIDENT OF THE STATE OF HAWAII, IS THE CHIEF OF SECURITY OF H.C.F. AND IS HELD LIABLE IN HIS CAPACITY BY KNOWLEDGE AND ACQUIESCENCE, AND HAS ALSO PLAYED AN ACTIVE ROLE IN IGNORING MY COMPLAINTS VIA GRIEVANCE.

7. PLAINT CONTENDS THAT THE ADDED DEFENDANTS KNEW OR SHOULD HAVE KNOWN ABOUT THE CONSTITUTIONAL VIOLATIONS THAT GO ON THROUGH OUT THEIR INSTITUTIONS AND STAFF.

RELIEF

8. PLAINTIFF SEEKS DECLATORY JUDGMENT, INJUNCTIVE RELIEF, AND DAMAGE AWARDS AS LISTED BELOW. ALSO REASONABLE ATTORNEY FEES AS THE HONORABLE COURT DEEMS FIT

9. PLAINTIFF SEEKS DAMAGES IN THE SUM OF \$10,000 COMPENSATORY AND \$10,000 PUNITIVE DAMAGES FROM EACH DEFENDANT.

10. EACH DEFENDANT IS SUED IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES.

DATED: HONOLULU, HAWAII, APRIL 29, 1988

/s/ DeMont R.D. Conner
DeMONT R.D. CONNER
PRO SE
99-902 MOANALUA HWY.
AIEA, HAWAII 96701

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

ANSWER TO AMENDED COMPLAINT

(Filed May 23, 1988)

Come now Defendants in the above-entitled action, through their attorneys, Warren Price, III, Attorney General, State of Hawaii, and Glenn S. Grayson, Deputy Attorney General, and answer the complaint as follows:

FIRST DEFENSE

The complaint fails to state a claim against Defendants, and each of them, upon which relief can be granted.

SECOND DEFENSE

1. Defendants deny each and every allegation contained in every paragraph of the complaint and amended complaint.

THIRD DEFENSE

Defendants are protected from liability by the doctrine of qualified immunity.

FOURTH DEFENSE

Defendants are protected from liability by the doctrine of sovereign immunity.

FIFTH DEFENSE

This action is barred by the statute of limitations.

WHEREFORE, Defendants pray that the complaint herein be dismissed and that they be allowed their costs, reasonable attorney's fees, and such other relief as the Court deems appropriate.

Dated: Honolulu, Hawaii, MAY 23 1988

WARREN PRICE, III
Attorney General
State of Hawaii

/s/ Glenn S. Grayson
GLENN S. GRAYSON
Deputy Attorney General

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

PLAINTIFFS BRIEF IN SUPPORT OF COMPLAINT
AND AMENDED COMPLAINT

(Filed June, 15 1988)

THIS IS A § 1983 ACTION FILED BY A PRISONER AT THE HALAWA HIGH SECURITY FACILITY (HEREINAFTER H.H.S.F.) SEEKING DECLARATORY JUDGMENT AND DAMAGES. IN PLAINTIFFS AMENDED COMPLAINT PLAINTIFF ADDED INJUNCTIVE RELIEF. BASED ON PRISON OFFICIALS' ARBITRARY PROCEDURE IN A DISCIPLINARY HEARING, WHERE HE WAS DENIED THE RIGHT TO QUESTION THE CORRECTIONAL OFFICER WHOM WROTE HIM UP; TO REVIEW THE SUBMITTED REPORTS; AND TO CALL WITNESSES ON HIS BEHALF. PLUS PRISON OFFICIALS ARBITRARY ACTIONS TAKEN AGAINST PLAINTIFF WHILE HOUSED IN THE SPECIAL HOLDING UNITS AT H.H.S.F. AND H.M.S.F. (HALAWA MEDIUM SECURITY FACILITY) FOR A TOTAL OF (6) SIX MONTHS, UNDER ILLEGAL CONFINEMENT.

CLARIFICATION AND DESCRIPTION/
STATEMENT OF FACTS

PLAINTIFF PURSUANT TO THE HONORABLE BERT TOKARUN [sic], MAGISTRATE IN THIS ISSUE, DECISION THAT PLAINTIFF SHOULD PROVIDE DEFENDANTS WITH A DESCRIPTION OF THE NATURE OF THE DISCIPLINARY PROCEEDING

WHICH IS THE SUBJECT OF PLAINTIFFS ORIGINAL COMPLAINT.

PLAINTIFF THEREFORE SHALL PROCEED IN THIS BRIEF, TO CLARIFY AND DESCRIBE IN MINUTE DETAIL, EACH AND EVERY ALLEGATION THAT HE MAKES AGAINST DEFENDANT AS BEST AS HE CAN, IN GOOD FAITH, TO PROMOTE AN UNDERSTANDABILITY FOR ALL PERSONS INVOLVED, AND FAIRNESS.

STATEMENT OF FACTS

1. ON AUGUST 28, 1987, PLAINTIFF WAS SUMMONED TO THE H.H.S.F.'S PAROLE BOARD HEARING/INTERVIEW ROOM TO FACE CHARGES ON AN ALLEGED VIOLATION OF CORRECTIONS DIVISIONS TITLE 17 RULES § 17-201-7(14): THE USE OF PHYSICAL INTERFERENCE OR OBSTACLE [sic] RESULTING IN THE OBSTRUCTION, HINDERANCE [sic], OR IMPAIRMENT OF A CORRECTIONAL FUNCTION BY A PUBLIC SERVANT (A HIGH MISCONDUCT CATAGORY [sic]); AND §§ 17-201-9(5) AND (12): USING ABUSIVE OR OBSCENE LANGUAGE TO A STAFF MEMBER; AND HARASSMENT OF EMPLOYEES (RESPECTIVELY) (LOW MODERATE MISCONDUCTS).

2. I [IT] WAS IN THIS HEARING THAT DEFENDANT CINDA SANDIN, WHOM WAS THE CHAIRMAN OF PLAINTIFFS ADJUSTMENT COMMITTEE HEARING, DENIED PLAINTIFF THE RIGHT TO: A. QUESTION THE CORRECTIONAL OFFICER WHOM HAD MADE THE ALLEGATIONS AGAINST ME. B. TO VIEW THE SUBMITTED REPORTS. C. DEFENDANT SANDIN

ALSO DENIED PLAINTIFF ARBITRARILY, THE OPPORTUNITY [sic] TO CALL STAFF WITNESSES WHO WERE PRESENT AT THE ALLEGED INCIDENT, AND D. TO CALL STAFF WITNESSES ON PLAINTIFFS BEHALF. SUBSEQUENTLY PLAINTIFF WAS FOUND GUILTY OF THE SAID MISCONDUCTS.

3. DEFENDANT SANDIN SENTENCED PLAINTIFF TO 30 DAYS IN SPECIAL HOLDING.

4. DEFENDANT SANDIN FURTHERMORE ARBITRARILY VIOLATED PLAINTIFFS RIGHTS BY DENYING PLAINTIFF THE RIGHT TO PETITION THE COURTS, WHEN DEFENDANT WITHHELD PLAINTIFFS LEGAL MATERIALS FOR TWO MONTHS.

5. DEFENDANT SANDIN FURTHERED HER ILLEGAL ACTS WHEN SHE CONTINUALLY REJECTED ARBITRARILY, PLAINTIFFS ATTEMPTS TO REGAIN HIS LEGAL MATERIALS VIA GRIEVANCES BY SHUFFLING RESPONSIBILITIES OF THE HANDLING OF LEGAL MATERIALS.

6. PLAINTIFF WOULD NOT BE SUCCESSFUL AT ATTEMPTS HE MADE TO SOLVE THIS PROBLEM INTERNALLY BY FOLLOWING ADMINISTRATIVE PROCEDURES IN FILING GRIEVANCES, BECAUSE DEFENDANT SANDIN OFTEN ANSWERED HER OWN GRIEVANCES (THOSE MADE AGAINST HER).

7. IT WAS AROUND THIS TIME PERIOD, THAT (AUGUST '87 - NOVEMBER '87) PLAINTIFF NOTICED ALL SERIOUS GRIEVANCE WRITERS (JAIL-HOUSE LAWYERS) WERE SENT TO THE "HOLE" (SPECIAL HOLDING) ON ALLEGED FICTICIOUS [sic] CHARGES,

AND ALL WERE IN ONE WAY OR ANOTHER RETALIATED AGAINST BY DEFENDANT SANDIN AND/OR OTHER PRISON PERSONNEL. BUT FOR PLAINTIFF THIS RETALIATION TREATMENT HAD BEEN DONE IN A COMBINATION OF WAYS, OF WHICH PLAINTIFF TRIED TO LOG EVERYTHING DOWN VIA GRIEVANCE. FURTHERMORE SO BAD WAS THIS [sic] ARBITRARY ACTS THAT PLAINTIFF SUFFERED MENTALLY AND EMOTIONALLY.

A. ESTABLISHING PERSONAL INVOLVEMENT: DEFENDANT CINDA SANDIN IS HELD LIABLE BY HER CONTINUOUSLY ARBITRARY ACTIONS (MENTIONED EARLIER) AGAINST PLAINTIFF.

B. DEFENDANT LEONARD GONSALVES IS HELD LIABLE BY KNOWLEDGE AND ACQUIESCENCE; WHAT ACTIONS HE ENFORCED WAS VIOLATORY OF PLAINTIFFS CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS: FOR DEFENDANT GONSALVES HAS ENFORCED THE ARBITRARY STRIP-SEARCH PROCEDURE WHICH IS ONE OF THE FACTORS THAT HELPED TO PROMOTE PLAINTIFFS SUFFERINGS. ALSO DEFENDANT GONSALVES PLAYED AN IMPORTANT PART IN FURTHERING PLAINTIFFS ANGUISH BY HINDERING THE GRIEVANCE PROCESS, OF WHICH HE ANSWERED STEPS ONE AND TWO, AND JUST DENIED PLAINTIFFS COMPLAINTS. DEFENDANT GONSALVES' ACTIONS WILL TEND TO SHOW ARBITRARINESS.

C. DEFENDANT LAWRENCE SHOHET IS HELD LIABLE FOR HIS PART IN IMPLEMENTING AN ARBITRARY AND ILLEGAL PHASING SYSTEM CALLED

SEGREGATION MAXIMUM CONTROL PROGRAM (HERIN [sic] AFTER PHASE ONE) THE LEVEL PLAINTIFF IS CHALLENGING IS PHASE ONE WHICH ARBITRARILY SUBJECTS INMATES TO PUNISHMENT BEYOND THEIR ADJUSTMENT COMMITTEE SENTENCES. THIS "PHASE ONE" SYSTEM ENHANCED PLAINTIFFS VULNERABILITY TO ACCUMULATE MISCONDUCTS WHILE HE (PLAINTIFF) DID HIS MENTIONED (6) MONTHS TIME IN SPECIAL HOLDING, OF WHICH PLAINTIFF CONTENDS THAT THESE "STAFF PROVOKED" MISCONDUCTS WERE GIVEN IN RETALIATION TO PLAINTIFF UNTIL STOPPED WRITING GRIEVANCES AGAINST OFFICIALS, WHEN PLAINTIFF DID HAULT [sic] HIS GRIEVANCES HE WAS SUBSEQUENTLY LET OFF OF A MAJOR MISCONDUCT OF WHICH PLAINTIFF WAS GUILTY OF, AND THEN PLAINTIFF WAS EVENTUALLY ALLOWED TO RETURN TO GENERAL POPULATION. DEFENDANT SHOHET ALSO AT TIMES FAILED TO INVESTIGATE PLAINTIFF COMPLAINTS SO HE IS LIABLE FOR FAILING TO RENDER RELIEF, WHEN HE HAD THE POWER TO DO SO.

D. DEFENDANTS WILLIAM OKU, THEODORE SAKAI, AND HAROLD FALK, ARE HELD LIABLE ALSO FOR THEIR PART IN IMPLEMENTING AN ILLEGAL PHASING SYSTEM WHICH IS ARBITRARY, AND WHICH ENHANCED PLAINTIFFS ANGUISHES, WHILE PLAINTIFF WAS HELD IN ILLEGAL CONFINEMENT.

E. DEFENDANTS OKU, AND SAKAI, ALSO ARE LIABLE FOR THE ARBITRARY SAID ILLEGAL STRIP-SEARCH PROCEDURE WHICH PLAINTIFF ON

NUMEROUS ACCOUNTS HAD BEEN SUBJECTED TO. THIS PROCEDURE HELPED TO PROMOTE PLAINTIFFS ANGUISHES.

F. DEFENDANT SAKAI, INDIVIDUALLY IS ALSO LIABLE BY KNOWLEDGE AND ACQUIESCENCE, FOR OFTEN HE HAS REFUSED TO RENDER RELIEF IN PLAINTIFF GRIEVANCE COMPLAINTS TO HIM FURTHERING PLAINTIFFS ANGUISH.

G. DEFENDANTS OKU, AND SHOHET ARE ALSO LIABLE FOR THEIR INVOLVEMENT IN IMPLEMENTING AND [sic] ILLEGAL, IRRATIONAL, AND ARBITRARY STRIP-SEARCH PROCEDURE, WHICH AS BRIEFLY DISCUSSED *INFRA*, FURTHERED PLAINTIFFS ANGUISH.

H. ANOTHER ARBITRARY SEGMENT THAT PLAYED A KEY ROLE IN PLAINTIFFS ANGUISHES, IS THE DENIAL OF ADEQUATE RECREATION TIME. DEFENDANTS OKU, SHOHET, AND GONSALVES ONLY PERMITTED ONE HOUR OF RECREATION PERIOD FOR ONE DAY OUT OF THE WEEK, AND THE SCHEDULING OFTEN CONFLICTED WITH PLAINTIFFS VISITING SCHEDULE CAUSING PLAINTIFF TO LOSE EVEN MORE RECREATION, WHEREBY PLAINTIFF HAD NO OTHER ADEQUATE MEANS TO VENTILATE HIS FRUSTRATIONS, WHICH ULTIMATELY, FURTHERED PLAINTIFFS ANGUISHES. THEREFORE DEFENDANTS OKU, SHOHET, AND GONSALVES ARE HELD LIABLE FOR THIS.

I. ARGUMENT TAKEN INDIVIDUALLY PLAINTIFFS SEVERE SUFFERINGS BY THE DEPRIVATION OF HIS CONSTITUTIONAL RIGHTS PROTECTED BY THE

FIRST, FOURTH, SIXTH, AND FOURTEENTH, AMENDMENTS CAUSED BY THE DEFENDANTS' ARBITRARY ACTIONS AGAINST PLAINTIFF, PLAINTIFF IS ENTITLED TO RELIEF.

ALTHOUGH PLAINTIFF ACKNOWLEDGES THAT HIS CONSTITUTIONAL RIGHTS ARE GREATLY LIMITED, AS A CONVICTED PRISONER, PLAINTIFF IS PROTECTED IN SOME MEASURE BY SEVERAL PROVISIONS OF THE UNITED STATES CONSTITUTION, AS WELL AS BY CERTAIN OTHER PROVISIONS OF STATE AND FEDERAL LAW. IN *WOLFF V. MCDONNELL*, 418 U.S. 539, 555-56, 94 S.C.T. 2963 (1974) THE COURT STATED: "LAWFUL IMPRISONMENT NECESSARILY MAKES UNAVAILABLE MANY RIGHTS AND PRIVILEGES [sic] OF THE ORDINARY CITIZEN, A "RETRACTION JUSTIFIED BY THE CONSIDERATIONS UNDERLYING OUR PENAL SYSTEM." BUT THOUGH HIS RIGHTS MAY BE DIMINISHED BY THE NEEDS AND EXIGENCIES OF THE INSTITUTIONAL ENVIRONMENT, A PRISONER IS NOT WHOLLY STRIPPED OF CONSTITUTIONAL PROTECTIONS WHEN HE IS IMPRISONED FOR CRIME. THERE IS NO IRON CURTAIN DRAWN BETWEEN THE CONSTITUTION AND THE PRISONS OF THIS COUNTRY." THEREFORE WHEN DEFENDANTS ARBITRARILY DEPRIVED PLAINTIFF OF THE MINIMAL CONSTITUTIONAL PROTECTIONS HE HAS, THEY (DEFENDANTS) ARE LIABLE FOR THEIR ACTIONS.

EACH FACTUAL ASPECT OF PLAINTIFFS ALLEGATIONS IS CONSTITUTIONALLY DEFECTIVE OF WHICH IF PLAINTIFF PROVES HE IS ENTITLED TO THE REQUESTED RELIEF.

II. IN THE TOTALITY OF CONDITIONS THAT PLAINTIFF HAD BEEN SUBJECTED TO, DEFENDANTS ULTIMATELY VIOLATED PLAINTIFFS EIGHTH AMENDMENT RIGHT, WHICH PROHIBITS "CRUEL AND UNUSUAL PUNISHMENT." OF WHICH PLAINTIFF IS ENTITLED TO RELIEF: THE COURT IMPLIES IN *HUTTO V. FINNEY* 437 U.S. 687, 98 S.C.T. 2565 (1978) THAT "TAKEN AS A WHOLE" TOTALITY CONDITIONS MAY VIOLATE THE PROHIBITION AGAINST "CRUEL AND UNUSUAL PUNISHMENT". THOUGH PLAINTIFF ACKNOWLEDGES THAT IN *HUTTO SUPRA*, "TOTALITY CONDITIONS" CLAIMS WERE OF THE PHYSICAL NATURE, AN INFERENCE MAY BE DRAWN THAT IN A GIVEN CASE SEVERE MENTAL AND/OR EMOTIONAL ANGUISH COULD ALSO BE INCLUDED.

WHEREBY PLAINTIFF RESTS THAT UPON A SHOWING THAT HE DID SUFFER MENTAL AND/OR EMOTIONAL ANGUISH, HE WILL BE ENTITLED TO RELIEF PROTECTED BY THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION. DAMAGES AWARDS MAY BE AVAILABLE, WHETHER THE DEFENDANTS ARE STATE OR FEDERAL OFFICIALS, *CAREY V. PIPHUS*, 435 U.S. 247, 266, 98 S.C.T. 1042 (1978); *CARLSON V. GREEN*, 466 U.S. 14, 22, 100 S.C.T. 1468 (1980); *PATON V. LAPRADE*, 524 F.2D 862, 871-72 (3RD CIR. 1975).

CONCLUSION

WHEREFORE PLAINTIFF RESTS WITH THE CONTENTION THAT HE IS ENTITLED TO ALL THE

REQUESTED RELIEF FROM EACH DEFENDANT, SET FORTH IN PLAINTIFFS' ORIGINAL AND AMENDED COMPLAINTS, FOR DEFENDANTS' ARBITRARY VIOLATIONS OF PLAINTIFFS CONSTITUTIONAL RIGHTS. PLUS REASONABLE ATTORNEY FEES AS THIS COURT DEEMS FIT.

RESPECTFULLY SUBMITTED,

/s/ DeMONT R.D. CONNER
DeMONT R.D. CONNER
 PRO SE
 99-902 MOANALUA HWY.
 AIEA, HAWAII 96701

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

AFFIDAVIT OF DeMONT R.D. CONNER
IN SUPPORT OF BRIEF

STATE OF HAWAII)
) S.S.
 CITY AND COUNTY)
 OF HONOLULU

PLAINTIFF DEMONT R.D. CONNER, HAVING FIRST BEEN DULY SWORN STATES THE FOLLOWING UNDER PENALTY OF PERJURY:

1. THAT HE IS THE PLAINTIFF IN THE ABOVE ENTITLED ACTION. I MAKE THIS AFFIDAVIT IN SUPPORT OF MY BRIEF WHICH SUPPORTS MY COMPLAINT AND AMENDED COMPLAINT.

2. ON AUGUST 28, 1987, DEFENDANT CINDA SANDIN DID VIOLATE MY RIGHT TO DUE PROCESS WHEN SHE DENIED ME THE RIGHT TO QUESTION THE CORRECTIONAL OFFICER WHOM HAD WRITTEN ME UP, AND TO REVIEW THE SUBMITTED REPORTS, AND TO CALL WITNESSES.

3. I WAS CHARGED WITH A MAJOR MISCONDUCT AS SET FORTH IN TITLE 17 OF THE CORRECTIONS DIVISIONS INMAT [sic] HANDBOOK § 17-201-7(14).

4. THAT ALL THE ALLEGATIONS SET FORTH IN PARAGRAPHS 3-7 AND A-H, ARE TRUE TO THE BEST OF MY KNOWLEDGE.

5. THAT I BRING MY BRIEF IN SUPPORT . . . AND AFFIDAVIT IN SUPPORT . . . IN GOOD FAITH.

FURTHER AFFIANT SAYETH NAUGHT.

DATED: HONOLULU, HAWAII, MAY 17, 1988

/s/ DeMONT R.D. CONNER
DeMONT R.D. CONNER
 PRO SE
 99-902 MOANALUA HWY.
 AIEA, HAWAII 96701

I DECLARE UNDER PENALTY OF PERJURY THAT THE
FOREGOING IS TRUE AND CORRECT.

SIGNED THIS 17TH DAY OF MAY 1988

/s/ DeMONT R.D. CONNER
DeMONT R.D. CONNER
PRO SE
99-902 MOANALAU HWY.
AIEA, HAWAII 96701

IN THE UNITED STATES COURT FOR THE
DISTRICT OF HAWAII

[Caption Omitted In Printing]

ORDER GRANTING WRIT OF HABEAS CORPUS
AD TESTIFICANDUM

(Filed July 21, 1988)

Plaintiff DeMont Conner is a pro se prisoner litigant presently incarcerated at the Halawa Medium Security Facility (HMSF). Plaintiff filed this 42 USC §1983 action on March 14, 1988 challenging the procedure in a disciplinary hearing where he alleges that he was denied the right to question a correctional officer, to review reports submitted on the charges, or to call witnesses on his behalf. He was subsequently sentenced to 60 days in the Special Holdings Unit of the HMSF.

The plaintiff has filed two motions asking for temporary restraining orders and/or preliminary injunctions. The first motion, filed on May 3, 1988, seeks to halt alleged harassment by prison officials at HMSF. The second motion, filed on June 15, 1988, is designated a Writ of Habeas Corpus which this Court will construe as a request for a temporary restraining order and/or preliminary injunction. The motion requests that the Plaintiff be placed in protective custody and have adequate access to the law library at HMSF. The Plaintiff has also petitioned this Court to issue a Writ of Habeas Corpus, filed on April 28, 1988, to be given access to the Law Library at HMSF.

Toward these claims the Plaintiff has petitioned this court to issue a Writ of Habeas Corpus Ad Testificandum,

filed on May 3, 1988, to have him produced at all hearings pertaining to this claim. Since the Defendants have not responded to any of the Plaintiff's claims this Court can only assume that the allegations of the Plaintiff are correct and that the Defendants have no objection to the relief sought. To give the Defendants the opportunity to respond and because there are not sufficient facts before this Court to enable it to comprehensively rule on the Plaintiff's motions for temporary restraining order and/or preliminary injunction, this Court will grant the Plaintiff's motion for Writ of Habeas Corpus Ad Testificandum. It is hereby ordered that a hearing be held on Aug. 26, 1988 at 2:00pm., before this Honorable Court.

IT IS HEREBY ORDERED that Plaintiff's application for a writ ad testificandum is GRANTED.

DATED: Honolulu, Hawaii, JUL 21 1988.

/s/ Bert S. Tokairin
UNITED STATES
MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

AFFIDAVIT OF CINDA SANDIN

(Filed Aug. 8, 1988)

STATE OF HAWAII)
) SS:
CITY AND COUNTY OF)
HONOLULU

CINDA SANDIN, being first duly sworn, on oath deposes and says that:

1. She is an employee of the Department of Corrections and is currently a unit manager at the High Security Facility (HSF) at the Halawa Correctional Facility.

2. She is familiar with the conditions of confinement of plaintiff DeMont Conner, and the facts in this affidavit are based on personal knowledge.

Plaintiff is an inmate at Halawa Security Facility (HSF) and is serving a life sentence with the possibility of parole, along with other sentences for various crimes including attempted murder, kidnapping, robbery, rape, burglary and others.

4. Exhibit "A" is a true and correct copy of the Notice of Report of Misconduct for an incident which occurred on August 13, 1987.

5. The Notice shows that plaintiff was notified on August 25, 1987, of a hearing on the disciplinary charges to be held on August 25, 1987.

6. As a result of the August 28, 1987, hearing at which plaintiff was allowed to present his side of the matter, plaintiff was found guilty of using Abusive or Obscene language to a Staff Member, and of Harassment of an Employee.

7. Two other charges relating to the use of physical interference were expunged.

8. Exhibit B is a true and correct copy of Misconduct Report relating to the August 13, 1987 incident.

9. Protective custody is used to protect inmates from other inmates, and plaintiff has not requested such protective custody.

10. If an inmate has a problem with a staff member, then the unit manager or other official will attempt to solve the conflict, which could mean separation of the people involved.

11. Plaintiff has failed to provide any specific reasons which would require such action, and his claims of harassment are vague and general.

12. Exhibit C is a true and correct copy of a grievance and answer which shows that plaintiff may contact the Federal Bureau of Investigation if he so desires.

13. Exhibit D is a true and correct copy of a grievance and answer which shows that the staff have worked to fix any problem with the shower at HSF.

14. Exhibit E is a true and correct copy of a grievance and answer which shows that plaintiff was provided with a new blanket when he complained that he was allergic to his first blanket.

15. Strip searches of inmates are carried out on the population of inmates generally, as a way to prevent the smuggling of contraband, and plaintiff is not treated differently [sic] than other inmates in this respect.

16. Inmates are given Tylenol pursuant to the following policy:

(a) Inmates may verbally request Tylenol from the staff in their housing unit; (b) the staff may give six doses per twenty-four hours for a maximum of seventy-two hours; (c) use of Tylenol shall be logged, and (d) additional Tylenol is available if an inmate requests to the Medical Unit is approved.

17. For security reasons, High Security inmates are not allowed direct access to the law library, but are provided with legal materials as described below.

18. An inmate at HSF may request materials through a written request form.

19. After receiving the request form, a library staff person will obtain requested circulating books, if available, and make copies of cases.

20. The inmate is allowed 2 books and 6 cases per request at one time.

21. If an inmate already has two books and six cases outstanding, he must return materials to receive the same number of new materials.

22. The library staff places the legal materials in a tray and the materials are delivered to HSF daily, Monday through Friday.

23. Generally, the requests are responded to within 24 hours.

24. There would be several obstacles in allowing plaintiff to go to the law library at the Medium Security Facility (MSF), which is a separate facility from HSF. Every inmate at HSF must be escorted in restraints by two Adult Corrections Officers (ACO's), one of which is armed, any time the inmate leaves HSF, and he must be transported in a secure vehicle. There would be great expense in such an escort to MSF while the ACO's guarded him during library use, as well as a drain on manpower.

Further Affiant sayeth naught.

/s/ Cinda Sandin
CINDA SANDIN

Subscribed and sworn to before me
this 5th day of August 1988.

/s/ Pauldine I. Chanzchrist
Notary public, State of Hawaii
My commission expires: 2/21/91 gde

[Exhibits "A" & "B" printed at Pet. App. "G"]

EXHIBIT C

STATE OF HAWAII DEPARTMENT OF SOCIAL SERVICES AND HOUSING Corrections Division

INMATE COMPLAINT/GRIEVANCE

Aco II Jeffry Johns SH
5/3/88
1300 hrs.

Rs 5-1988

Appellant's Name: DeMONT CONNOR

Soc. Sec. No.: 576-98-9907

Branch: H.C.F. Counselor: GARY KAPLAN
(Name)

TO (Step) 1. ☒ Section Supervisor/Parole Officer
2. ☐ Branch Administrator
3. ☐ Division Administrator

RE (Check ☒) Complaint against Gary Kaplan
(Name)

☐ Grievance based on action by Program/Adjustment Committee

[or] Hindering Prosecution
(name)

STATEMENT OF FACTS:

STATEMENT OF COMPLAINT/GRIEVANCE: ON
OR ABOUT THE 26TH OF MARCH 1988, I HAD SUBMITTED A REQUEST TO COUNSELOR GARY KAPLAN

TO ALLOW ME TO CALL AN AGENT OF THE FEDERAL BEAURAL [sic] OF INVESTIGATIONS TO LODGE A COMPLAINT (CIVIL) AGAINST (6) STAFF PERSONNEL, THIS REQUEST WENT UNANSWERED. THEN ON 5/2/88 I HAD SUBMITTED ANOTHER REQUEST ON THIS SAME ISSUE, TILL NOW THERE HAS BEEN NO ANSWER.

GROUND FOR RELIEF: (1) AS A PROFESSIONAL, STAFF MEMBERS SHOULD ALWAYS CONDUCT THEMSELVES WITH THE HIGHEST DEGREE OF ETHICS, AND IT IS CLEAR TO ME NOW THAT MR. KAPLAN (WHOM I'VE HAD A HIGH RESPECT FOR, IN CARRYING HIMSELF AS A PROFESSIONAL) HAS SUNKEN TO THAT LEVEL OF UNETHICAL CONDUCT, WHEN COMES TIME TO DO HIS JOB TO SIGN MY REQUEST WHETHER IT'LL BE APPROVED OR DISAPPROVED. IF A CRIME HAS BEEN COMMITTED IT MUST BE REPORTED TO THE PROPER AUTHORITIES, AND IF IT'S AN INMATE WHO WANTS TO REPORT IT, STAFF CANNOT PREVENT OR HINDER THIS PROCESS, NO MATTER EVEN IF IT IS A FELLOW COMRADE-IN-ARMS (STAFF).

RELIEF: (1) A CRIME HAS BEEN COMMITTED AGAINST ME, AND A SUBSEQUENT CONSPIRACY HAS BEEN MADE TO COVER UP THAT CRIME, AND I ALONE CANNOT PROVE THIS, BUT WITH THE UTMOST EXPERTISE OF THE F.B.I., I WILL BE ABLE TO PROVE IT! SO I WANT TO CALL THEM IMMEDIATELY

OR BE GIVEN THEIR ADDRESS SO I CAN WRITE TO THEM!

/s/ DeMONT R.D. CONNER
Signature of Inmate

5/3/88
Date

Decision: This staff member indicates that no request of this nature was received. He or other staff will be more than willing to assist you if a proper request is received. (You may submit in letter form in a confidential envelope if you so desire.) Complaint denied.

Received: DeMONT R.D. CONNER Date: 7/13/88

Decision of: Cinda Sandin
Signature

Unit Manager
Title

7-12-88
Date

EXHIBIT D

STATE OF HAWAII
DEPARTMENT OF SOCIAL SERVICES AND HOUSING
Corrections Division

INMATE COMPLAINT/GRIEVANCE

8 Hrs.

EMERGENCY

J.A. 11/5/87 0930

Appellant's Name: DeMONT CONNER

Soc. Sec. No.: 576-98-9907

Branch: H.C.F. Counselor: JOHN CABROL
(Name)

TO (Step) 1. ☒ Section Supervisor/Parole Officer
 2. ☐ Branch Administrator
 3. ☐ Division Administrator

RE (Check ☒) Complaint against MAINTENANCE/SEC-
 OND WATCH SGT. SALGADO
 (Name)

[] Grievance based on action by Program/Adjust-
 ment Committee

[or] CRUEL AND UNUSUAL PUNISHMENT:
SUBJECTING QUAD "C"
 (Name)

STATEMENT OF FACTS:

INMATES TO SUFFER SKIN BURNS FROM SHOW-
 ERING IN HOT WATER!!!

STATEMENT OF COMPLAINT/GRIEV-
 ANCE: SOMETHING HAS GOT TO BE DONE NOW,
 ABOUT THE FACT THAT I AM BEING SUBJECTED TO
 SHOWER IN HOT WATER, OF WHICH THE SHOWER
 ONLY GIVES, THERE IS NO COLD WATER. I'VE
 WAITED FOR A MORE THEN "REASONABLE"
 AMOUNT OF TIME FOR THE MAINTENANCE TO DO
 SOMETHING ABOUT THIS SEVERE PROBLEM SINCE
 LAST WEEK TUESDAY, IT'S TIME FOR SOME ACTION.

GROUND FOR RELIEF: (1) HOW COME SEC-
 URITY CAN GO AROUND MAKING ALL THIS UNREA-
 SONABLE RULES, AND DICTATE MEDICATION, ETC.,
 BUT THEY CAN'T EVEN PUSH FOR THE MAINTE-
 NANCE CREW TO COME AND FIX OUR SHOWER. (2)
 SGT. SALGADO HAS ALREADY SHOWN THAT HE IS A
 DOCTOR, AND A GOD, BY OVER FLEXING HIS SEC-
 URITY POWERS, WHY DON'T HE TRY PLAY PLUMMER
 [sic] TOO AND FIX THE DAMN SHOWER!

RELIEF: THAT THE MAINTENANCE FIX THIS
 SHOWER NOW!

/s/ DeMONT R.D. CONNER 11-5-87
 Signature of Inmate Date

Decision: The maintenance crew was unable to correct
 the problem with the showers due to other priorities.
 However, as of this writing, the situation has been cor-
 rected.

RECEIVED: /s/ DeMONT R.D. CONNER

DATE: 1/11/88

Decision of:	<u>Acting Unit Manager</u>
/s/ <u>John Cabrol</u>	Title
Signature	<u>1/6/88</u>
	Date

EXHIBIT E

STATE OF HAWAII
 DEPARTMENT OF SOCIAL SERVICES AND HOUSING
 Corrections Division

INMATE COMPLAINT/GRIEVANCE

(This issue has also received a response from it [sic]
 second step respondent with the 15 day working day
 limit)

R.C. 2/16/87

Appellant's Name: DeMONT CONNER

Soc. Sec. No.: 576-98-9907

Branch: H.C.F. Counselor: JOHN CABRAL
 (name)

- To (Step) 1. ☐ Section Supervisor/Parol Officer
 2. ☐ Branch Administrator
 3. ☒ Division Administrator

RE (Check ☒) Complaint against
H.C.F./MEDICAL UNIT
 (Name)

☐ Grievance based on action by Program/Adjustment Committee

[or] DENIAL OF AN ADEQUATE BLANKET FOR A WHOLE MONTH. INTENTIONAL AND MALICIOUS HARASSMENT.
 (Name)

STATEMENT OF FACTS:

STATEMENT OF COMPLAINT/GRIEVANCE: THIS GRIEVANCE IS BASED ON THE FACT THAT I HAVE BEEN FORCED TO GO THROUGH A WHOLE MONTH WITHOUT AN ADEQUATE BLANKET! AND [ILLEGIBLE] (1) RESPONDED AFTER THE 15 DAY (WORKING) LIMIT, THEREFORE RENDERING HIS ANSWERS VOID. MY QUESTION IS, WHY HAVE I BEEN SUBJECTED TO WAIT AN ENTIRE MONTH BEFORE I WAS GIVEN AN ADEQUATE BLANKET, BECAUSE THE ONE THAT WAS FIRST GIVEN TO ME IS ONE THAT I AM ALLERGIC TO!

GROUND FOR RELIEF: (1) I HAVE GONE THROUGH ALL THE PROPER STEPS SO I COULD GET MY BLANKET CHANGED, AND STILL NO ONE DID ANYTHING ABOUT THE PROBLEM. I'VE REQUESTED

TO THE SGT. ON DUTY, THE COUNSELOR, THE MEDICAL UNIT, BUT ALL I RECEIVED WAS REJECTIONS AND COLD BLOODED SUFFERING FOR AN ENTIRE MONTH! (2) ALSO SOMEONE DELIBERATELY LIED TO THE OMBUDSMAN, TELLING HIM THAT THE BLANKET I HAD WAS THE SAME KIND I HAD ISSUED TO ME AT THE HIGH SECURITY FACILITY. (3) I BELIEVE THEIR [sic] WAS A CONSPIRACY, TO SEE ME SUFFER LIKE THAT!

RELIEF: (1) THAT I BE GIVEN A WRITTEN APOLOGY BY THIS INSTITUTION'S STAFF WHO WERE DIRECTLY INVOLVED IN THIS INCIDENT AND BY THE MEDICAL UNIT, FOR THEIR UNETHICAL CONDUCT AGAINST ME!

/s/ DeMont R.D. Conner
 Signature of Inmate

11-12-87
 Date

Decision: Per Step 1 decision, a special-issue blanket has been approved.

Decision of Ted Sakai
 Signature

Administrator
 Title

2/21/88
 Date

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

PLAINTIFF'S MEMORANDUM IN REPLY TO
DEFENDANT'S OPPOSITION TO PLAINTIFF'S
MOTION FOR A PRELIMINARY INJUNCTION

(Filed Aug. 18, 1988)

COMES NOW PLAINTIFF DEMONT R.D. CONNER, PURSUANT TO LOCAL RULES [sic] 220 AND HEREBY FILES A REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION.

STATEMENT OF THE CASE

PLAINTIFF FILED THIS CIVIL RIGHTS ACTION AGAINST PRISON OFFICIALS, ALLEGING VIOLATION OF HIS DUE PROCESS RIGHTS IN A DISCIPLINARY HEARING, WHICH WERE PART OF AN ONGOING CONSPIRACY TO RETALIATE AND DISCRIMINATE AGAINST PLAINTIFF IN AN ATTEMPT TO DEPRIVE PLAINTIFF OF HIS FIRST AMENDMENT RIGHT TO PETITION THE GOVERNMENT TO SEEK REDRESS OF HIS GRIEVANCES.

FACTS

1. ON AUGUST 28, 1987, PLAINTIFF WAS SUMMONED TO THE HALAWA HIGH SECURITY FACILITY'S [sic] PAROLE BOARD/INTERVIEW ROOM TO FACE AN ADJUSTMENT COMMITTEE ON THREE MISCONDUCT CHARGES.

2. THE CHARGES WERE RULE VIOLATIONS OF TITLE 17 ADMINISTRATIVE RULES OF THE CORRECTIONS DIVISION § 17-201-7 (14) AND (16); THE USE OF PHYSICAL INTERFERENCE OR OBSTACLE RESULTING IN THE OBSTRUCTION, HINDERANCE, OR IMPAIRMENT OF THE PERFORMANCE OF A CORRECTIONAL FUNCTION BY A PUBLIC SERVANT § 17-201-9(5), USING ABUSIVE OR OBSCENE LANGUAGE TO A STAFF MEMBER. § 17-201-9(12), HARASSMENT OF EMPLOYEES.

3. THE COMMITTEE CONSISTED OF UNIT MANAGER CINDA SANDIN (CHAIRMAN ALSO A NAMED DEFENDANT), SOCIAL WORKER CAROLYN CORLEY, AND A. C.O. SHOOK.¹

4. PLAINTIFF PLED NOT GUILTY TO THE THREE CHARGES, ALTHOUGH THE COMMITTEE FOUND PLAINTIFF GUILTY ON ALL THREE CHARGES.

5. PLAINTIFF'S CLAIM OF DENIAL OF DUE PROCESS AROSE OUT OF THIS ADJUSTMENT COMMITTEE HEARING WHEN DEFENDANT SANDIN DENIED PLAINTIFF:

A) HIS RIGHT TO QUESTION THE OFFICER WHOM MADE THE ALLEGATION AGAINST PLAINTIFF

B) THE RIGHT TO REVIEW THE SUBMITTED REPORTS.

C) THE RIGHT TO PRESENT (STAFF) WITNESSES ON HIS BEHALF.

¹ A.C.O. Means adult correctional officer.

D) THE RIGHT TO QUESTION THE WITNESSES WHO WERE PRESENT AT THE INCIDENT.

E) OR THE OPPORTUNITY TO POSTPONE THE HEARING UNTIL HE HAD A CHANCE TO RECEIVE ANY ONE OR A COMBINATION OF "A THROUGH D".

6. PLAINTIFF WAS SENTENCED TO 30 DAYS PUNITIVE ISOLATION IN SPECIAL HOLDING UNIT.² (HEREINAFTER S.H.U.)

7. UPON PLAINTIFF'S ENTERING S.H.U. ALL HIS LEGAL MATERIALS WERE CONFISCATED WITHOUT BEING GIVEN ANY REASON WHY, BUT PLAINTIFF WAS TOLD TO "SEE CINDA ABOUT IT".

8. DISPUTE [sic] NUMEROUS REQUESTS AND GRIEVANCES PLAINTIFF WAS UNABLE TO REGAIN HIS LEGAL MATERIALS FOR TWO MONTHS, BUT PLAINTIFF WAS GIVEN VARIOUS EXCUSES BY DEFENDANT SANDIN FOR DELAYS IN PLAINTIFF RECEIVING HIS LEGAL MATERIALS.

9. PLAINTIFF WAS ALSO NOT ABLE TO BORROW LEGAL MATERIALS FROM THE LAW LIBRARY FOR THE SAME TIME PERIOD OF TWO MONTHS DESCRIBED ABOVE.

10. ON OCTOBER 23, 1987 PLAINTIFF WAS FINALLY ALLOWED TO BORROW LEGAL MATERIALS FROM THE LAW LIBRARY, AND TO RETAIN HIS PERSONAL LEGAL MATERIALS. ALL LEGAL MATERIALS

² The special holding unit houses inmates on disciplinary phase one, administrative segregation, and protective custody.

WERE SUBJECT TO THE FOLLOWING LIMITATIONS WHICH ARE STILL PRESENTLY IMPOSED:

A) (6) SIX CASE CITES.

B) (2) LEGAL BOOKS

C) AND (2) TWO PERSONAL DOCKETED AND VERIFIED COURT CASES.

11. PLAINTIFF WAS DENIED ADEQUATE EXERCISE AND RECREATION.

12. PLAINTIFF WAS DENIED MEDICATION WHICH HE WAS ON THE MEDICAL LIST TO RECEIVE SUCH.

13. IT WAS ONLY EITHER ONE OF TWO PARTICULAR STAFF MEMBERS WHOM WOULD DICTATE WHEN PLAINTIFF COULD AND COULD NOT RECEIVE HIS MEDICATION, NAMELY, A.C.O. EDWARD MARSHAL AND EX A.C.O. JAMES CHEE.

14. PLAINTIFF HAD BEEN DENIED AN ADEQUATE BLANKET FOR ONE MONTH.

15. PLAINTIFF WAS AND IS MADE A TARGET FOR MISCONDUCTS WHICH WERE "STAFF PROVOKED," IN PART PARTICULAR: A.C.O. EDWARD MARSHAL AND EX A.C.O. JAMES CHEE.

16. PLAINTIFF WAS FOUND GUILTY ON VIRTUALLY ALL THE MISCONDUCTS DESPITE HIS BEING INNOCENT OR GUILTY.

* * *

[Material Deleted In Printing]

I DECLARE UNDER PENALTY OF PERJURY THAT
THE FOREGOING IS TRUE AND CORRECT. EXECUTED
ON AUGUST 16, 1988.

/s/ DeMONT R.D. CONNER
DeMONT R.D. CONNER,
PRO SE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

REPORT RECOMMENDING PARTIAL GRANTING OF
MOTION FOR PRELIMINARY INJUNCTION

(Filed Sep. 6, 1988)

A hearing was held on Plaintiff's motion for preliminary injunction in this case on August 26, 1988 before the Honorable Bert S. Tokairin. Plaintiff DeMont Conner appeared pro se, and Glenn Grayson and Frank Kim appeared for the Defendants. The court having reviewed the pleadings filed and listened to the oral argument presented hereby recommends that the motion be granted in part and denied in part.

Plaintiff DeMont Conner is a pro se prisoner litigant presently incarcerated at the Halawa Medium Security Facility (HMSF). Plaintiff filed this 42 USC 1983 action on March 14, 1985 challenging the procedure in a disciplinary hearing where he alleges that he was denied the right to question a correctional officer, to review reports submitted on the charges, or to call witnesses on his behalf. He was subsequently sentenced to 60 days in the Special Holdings Unit of the HMSF.

The plaintiff has filed two motions asking for a temporary restraining order and/or a preliminary injunction. The first motion, filed on May 3, 1988, seeks to halt alleged harassment by prison officials at HMSF. The second motion, filed on June 15, 1988, seeks similar relief and library access.

Plaintiff petitioned this court to issue a Writ of Habeas Corpus Ad Testificandum to have him produced at all hearings pertaining to this claim. Since the Defendants did not respond to any of the Plaintiff's claims this Court scheduled this hearing to give the Defendants the opportunity to respond and also because there were not sufficient facts before this Court to enable it to comprehensively rule on the Plaintiff's motions. Since the scheduling of this hearing, both parties have submitted pleadings pertaining to these motions.

In order to obtain preliminary injunctive relief Plaintiff must demonstrate either a combination or probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. *Zepeda v. United States INS*, 753 F.2d 719 (9th Cir. 1983).

Protective Custody

Plaintiff seeks to be placed in protective custody and to be free from harassment and assault by prison officials (Defendants). He claims that Defendants filed false misconduct reports against him and caused him to be subjected to disciplinary segregation. However, Plaintiff has not requested protective custody from other inmates. He has failed to provide any specific reasons to justify action in separating Plaintiff from any staff members, and his claims of harassment are vague. Therefore, he has not demonstrated that he is entitled to a preliminary injunction in this area.

Library Access

Plaintiff seeks to have adequate access to the law library at HMSF stating that he has no physical access, and that his cases have been confiscated by ACO Edward Marshall. Defendants' policy is that high security inmates are not given direct access to the law library for security reasons. They must be escorted in restraints by two ACOs, one of which is armed, while transporting the inmate to the law library which is located at the Medium Security Facility. Inmates are provided with legal materials upon written request, and are allowed 2 books and 6 cases per request, and allowed to retain only that amount at any one time.

A constitutional violation of rights such as denial of access to the law library is inherently prejudicial and the inmate is entitled to either direct physical access to the library or assistance from someone trained to do research. *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986). The state has routinely failed to provide any facts to back their broad allegations of security problem claims, and this court has determined that the problems are not overly burdensome. Judge Kay has ordered in *Smith v. Sandin*, that the following procedures be implemented by the prison in this area:

- a) Allow the inmate direct physical access to the law library commensurate to that which medium security inmates enjoy, or provide the inmate with trained legal assistance;
- b) Permit the inmate to retain personal legal materials in his cell on a permanent basis rather than the 2 book and 6 case limit;

c) Furnish the inmate with an entire writing tablet of paper and debit the inmate's account; and

d) Permit the inmate to retain an ink pen until 10:00 pm when requested.

This Court recommends that these procedures be instituted in this case also.

Miscellaneous claims

Plaintiff's other claims are that Defendants have denied Plaintiff Tylenol and cold medication, many of Plaintiff's grievances which he has filed have been lost or misplaced, Plaintiff has been denied adequate exercise and recreation, denied an adequate blanket, been subjected to a defective shower, had his mail improperly censored, and his requests for legal materials delayed.

Defendants have submitted an affidavit, and Plaintiff acknowledged at the hearing that these problems have been corrected for the most part. The defective shower was fixed as of Jan. 6, 1988, Plaintiff was provided a new blanket on Feb. 21, 1988 when he complained he was allergic to his first blanket, and inmates are given Tylenol and medication upon request when the medical staff makes daily rounds. Plaintiff's other requests have been refuted by Defendants, and they create issues of fact for trial. There has been no showing of entitlement to a preliminary injunction in these areas.

Accordingly, this Court Recommends that the motion for preliminary injunction be granted in part and denied in part as described above to give Conner the access to

courts in the manner that has been adopted and recommended by courts in this district.

DATED: Honolulu, Hawaii, SEP 6 1988.

/s/ Bert S. Tokairin
UNITED STATES
MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

ORDER ADOPTING MAGISTRATE'S REPORT
RECOMMENDING PARTIAL GRANTING OF
MOTION FOR PRELIMINARY INJUNCTION
OF SEPTEMBER 6, 1988

(Filed Dec. 2, 1988)

This matter comes before the court on Magistrate Tokairin's Report Recommending Partial Granting of Motion for Preliminary Injunction filed September 6, 1988. Plaintiff filed objections on September 19, 1988.

Plaintiff filed a 42 U.S.C. § 1983 claim while a high security inmate at Halawa High Security Facility. In his complaint, plaintiff alleged that at a parole board misconduct hearing that he was denied the ability to confront the prison official that "wrote him up," to review the submitted reports containing the charges against him, and to call witnesses on his behalf. Plaintiff's petition to proceed in forma pauperis was granted on April 11, 1988.

Plaintiff subsequently filed an amended complaint to add two additional defendants on May 3, 1988. On the same date, plaintiff filed his Motion for Temporary Restraining Order and/or Preliminary Injunction requesting the court to direct all defendants and their agents "to halt [sic] all attempts to harass plaintiff and to abate the false charges of assaulting any person . . . until such time that a complete investigation is done by an officer of the beaural [sic] of investigations on charges of assault and conspiracy and to place plaintiff under protective custody

at H.C.F." The court notes that the state defendants failed to respond to plaintiff's motion for preliminary injunction.

A hearing was held before Magistrate Tokairin on August 26, 1988. The Magistrate partially granted the preliminary injunction only insofar as the prison must allow plaintiff access to the law library in accordance with this court's previous findings that a modicum of access is constitutionally required to ensure a prisoner's access to the court system. However, the Magistrate specifically held that plaintiff's other requested relief in his preliminary injunction was either not supported by the facts adduced at the hearing or did not meet the immediate and irreparable harm standard necessary for a court to grant a preliminary injunction.

A Magistrate's Report and Recommendation under United States District Court for the District of Hawaii Rule 404-2 is reviewed de novo for factual or legal error. The Ninth Circuit standard for review of issuance of a preliminary injunction is abuse of discretion. *Zepeda v. United States INS*, 753 F.2d 719, 724-25 (9th Cir. 1983). Abuse of discretion occurs when a decision rests on a clearly erroneous finding of fact. *Id.*, at 725. An order is reversible for legal error if the court did not employ the appropriate legal standards which govern the issuance of a preliminary injunction. *Id.*, at 724. This court finds that the Magistrate used the correct legal standard for a preliminary injunction under *Zepeda*, and that he did not base his ruling on a clearly erroneous finding of fact.

Plaintiff, in his objections, correctly enunciates the legal standard which the Magistrate used to determine

his claim for a preliminary injunction under *Zepeda, supra*. Under *Zepeda*, a plaintiff must demonstrate either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. The Magistrate grouped the plaintiff's claims into those involving protective custody, library access and miscellaneous claims.

A. Protective Custody

With regard to protective custody, the Magistrate found, based upon testimony at the hearing, that the plaintiff failed to "provide specific reasons to justify action in separating Plaintiff from any staff member, and his claims of harassment are vague." This court finds nothing in the record to contradict this finding of fact by the Magistrate. Therefore, this finding cannot be seen as clearly erroneous. More so, the plaintiff raises no specific instances of harassment in his objections and relies only on similarly vague allegations. Under the *Zepeda* standard, this is insufficient proof of immediate and irreparable harm.

B. Library Access

The Magistrate granted plaintiff's request for a preliminary injunction with regard to plaintiff's access to the law library. In so doing, the Magistrate recommended that the defendants be ordered to implement a scheme of library access similar to that ordered in *Smith v. Sandin*, Civ. No. 88-0060, Ordered filed July 14, 1988. The plaintiff does not object to this ruling.

Accordingly, the procedures to be implemented in this case by defendants are:

- a) Allow the inmate direct physical access to the law library commensurate to that which other medium security inmates enjoy, or provide the inmate with trained legal assistance;
- b) Permit the inmate to retain personal legal materials in his locker on a permanent basis rather than the 2 book and 6 case limit;
- c) Furnish the inmate with an entire writing tablet of paper and debit the inmate's account; and
- d) Permit the inmate to retain an ink pen until 10:00 pm when requested.

C. Miscellaneous Claims

In plaintiff's application for a preliminary injunction, he alleged that he had been denied Tylenol and cold medicine, a blanket, recreation, adequate showers, unjustified strip searches, that he had been the subject of fictitious misconduct reports, and that his grievances had been lost and misplaced. At the hearing, testimony established that some of these claims were now moot and therefore not the proper subject of a preliminary injunction. Specifically, plaintiff was provided with a blanket, the showers which he used had been fixed, and that the nurse makes daily rounds to distribute Tylenol and other medications.

With regard to the remaining claims, the Magistrate found that defendants factually refuted the claims. The Magistrate found that plaintiff failed to meet the burden

of establishing immediate and irreparable harm and a likelihood of success. However, the Magistrate stated that this is not fatal to Conner's claims, but that they properly are left for further proceedings or trial. From the record, the Magistrate's findings are not clearly erroneous. Plaintiff was afforded an opportunity at a hearing to establish immediate and irreparable injury and probable success on the merits or the serious questions are raised and the balance of hardships tips sharply in his favor, which he factually was unable to do. *See Zepeda, supra.*

The standard to obtain a preliminary injunction is a high standard which is rarely granted in the absence of concrete facts in support. At the hearing, facts were not brought to light justifying a preliminary injunction, except those regarding library access. As there is no contradictory evidence in the record, aside from unsubstantiated allegations, the Magistrate's findings cannot be found as clearly erroneous. It should be noted, however, that while plaintiff's motion for preliminary injunction was denied in part by the Magistrate, that the plaintiff's claims remain for trial or other future proceedings.

Accordingly, the Magistrate's Report Recommending Partial Granting of Motion for Preliminary Injunction of September 6, 1988 is ADOPTED. The defendants are hereby ordered to implement the procedures allowing for access to the Halawa Medium Security Facility, enumerated herein on page 4.

SO ORDERED.

DATED: Honolulu, Hawaii, DEC 2 1988.

/s/ Alan C. Kay
United State District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

AFFIDAVIT OF DeMONT R.D. CONNER

(Filed Feb. 7, 1989)

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF)
HONOLULU

I, DeMONT R.D. CONNER, BEING DULY SWORN,
DEPOSES AND SAYS:

1. THAT I AM THE PLAINTIFF IN THE ABOVE
ENTITLED ACTION AND THAT I MAKE THIS AFFI-
DAVIT IN SUPPORT OF MY MOTION FOR ORDER TO
SHOW CAUSE.

2. THAT THIS AFFIDAVIT IS BROUGHT IN
GOOD-FAITH.

3. THAT I HAVE BEEN ARBITRARILY DENIED MY
LEGAL PAPERS WHEN DEFENDANTS AGENTS BRIAN
LEE, AND WILLIAM PAAGA HAVE CONFISCATED MY
GREAT WRIT OF HABEAS CORPUS, AND THEN TOR
[sic] OUT EXHIBITS I.E. A REQUEST FORM W/BRIAN
LEE DENYING ME TO HAVE MY KORAN; AND COPIES
OF 2 CALLENDAR [sic] WHICH I WAS GOING TO USE
TO SHOW THIS COURT COPIES OF THE SAME CAL-
LENDAR [sic] THAT BRAIN LEE CONFISCATED FROM
MY CELL, WHICH POSED NO THREAT TO THE SECU-
RITY ETC. AND OF WHICH WAS BEING USED TO
MARK THE DATES WHEN I SENT OUT LEGAL MAIL,

AND TO KEEP THE DATES OF RELIGIOUS MATTERS,
AND ALSO A MOTION FOR A PRELIMINARY INJUNC-
TION WHICH WAS WRITTEN ON THE BACK OF A
GRIEVANCE FORM BECAUSE I HAD NO PAPER TO
WRITE WITH; AND 8 SHEETS OF PAPER THAT I CON-
STRUCTED WITH A PIECE OF YELLOW PAPER AND
STAPLES AND USED AS AN INDEX FOR MY LEGAL
PAPERS; AND ALSO THAT EVERYTIME I COME BACK
FROM THE LAW LIBRARY BRIAN LEE AND/OR WIL-
LIAM PAAGA ALWAYS CONFISCATES SOMETHING
FROM OR ALL OF MY LEGAL PAPERS WITH NO
ASSURANCE OF WHEN MY PAPERS WOULD BE
GIVEN BACK. I HAVE MADE REQUEST THIS 2ND DAY
OF FEBRUARY 1989 TO GO THROUGH MY LEGAL
PAPERS WHICH WERE TAKEN FROM MY CELL IN
OCTOBER 1988, BUT WAS NOT ALLOWED TO, PLAIN-
TIFFS SUSPECTS THAT THESE PAPERS ARE MISSING-
ALL 6 INCHES OF IT.

4. THAT I AM NOT GIVEN AN ENTIRE WRITING
TABLET WHEN I REQUEST FOR IT, THAT I WOULD
HAVE TO WAIT AT LEASE [sic] ONE WEEK BEFORE I
RECEIVE A WRITING TABLET, AND THAT IF I AM
NOT GIVEN 2 WRITING TABLETS TOMORROW 2-3-89
IT WILL BE AT LEASE [sic] MONDAY 2-6-89 BEFORE I
CAN EXPECT A WRITING TABLET.

5. THAT IN MID-JANUARY I WAS MADE TO
WAIT AT LEASE [sic] ONE WEEK BEFORE I GOT A
WRITING TABLET, FOR WHICH I MADE (3) REQUESTS
FOR, AND THAT SO FAR I HAVE MADE TWO
REQUESTS THIS WEEK FOR A WRITING TABLET
1-30-89 AND 2-1-89.

6. THAT ON THIS 2ND DAY OF FEBRUARY 1989 I MADE A REQUEST TO HAVE (4) SHEETS OF WRITING PAPER AND WAS NOT GIVEN ANY.

7. THAT ON 1-24-89 I WAS ONLY PERMITTED USE OF MY PEN FOR (2) HOURS FROM 7:30 PM TILL 9:30 PM; THAT ON 1-29-89 I WAS DENIED A PEN WITH INK; THAT ON 1-30-89 AFTER BEING TOLD THE PREVIOUS DAY TO DO, I REQUEST TO HAVE A NEW PEN AND WAS DENIED (4) HOURS AND TOLD TO USE MY OLD PEN WHICH HAD NO INK; THAT I HAVE NEVER BEEN ABLE TO USE MY PEN TILL 10:00 PM BECAUSE THE DEFENDANTS AGENTS COME IN AT 9:30 PM OR 9:45 PM AND COLLECT MY PEN AS THEY LOCK-DOWN BEFORE GOING HOME.

8. THAT ALL THESE ACTS DESCRIBED ABOVE BY DEFENDANTS AND THEIR AGENTS CAUSES PLAINTIFF GREAT FRUSTRATION FOR WHICH IS HARD FOR PLAINTIFF TO CONTROL.

FURTHER AFFIANT SAYETH NAUGHT.

DATED: HONOLULU, HAWAII, FEBRUARY 2, 1989.

/s/ DeMONT R.D. CONNER
DeMONT R.D. CONNER
 PRO SE
 99-902 MOANALOA HWY.
 AIEA, HAWAII 96701

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED THIS 2ND DAY OF FEBRUARY 1989.

/s/ DeMONT R.D. CONNER
DeMONT R.D. CONNER
 PRO SE

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF HAWAII

[Caption Omitted In Printing]

AFFIDAVIT OF DeMONT R.D. CONNER

(Filed Feb. 24, 1989)

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF)
HONOLULU

I, DeMONT R.D. CONNER, UNDER PENALTY OF
PERJURY HEREBY STATES AND AVERS:

1. THAT I AM THE AFFIANT IN THE ABOVE-
ENTITLED ACTION AND THAT I MAKE THIS AFFI-
DAVIT IN GOOD FAITH AND ON BEHALF OF MY
MOTION FOR PRELIMINARY INJUNCTION.

2. THAT I AM NOT ALLOWED TO HAVE A
PRAYER RUG, PRAYER CAP, NOR A PRAYER MEDAL-
LION, ACCORDING TO DEFENDENTS RULES.

3. THAT ACCORDING TO THE INMATE GUIDE-
LINES I AM NOT ALLOWED TO HAVE SHAMPOO
WHILE IN DISCIPLINARY SEGREGATION OR PHASE
ONE, AND I AM ONLY ALLOWED TO HAVE SOAP
ONCE A WEEK.

4. THAT ON NUMEROUS OCCASIONS I HAVE
BROUGHT TO THE ATTENTION OF DEFENDANTS
AGENTS THAT MY FOOD PLATE CONTAINED PORK
BUT I WAS IGNORED, AND THAT IN OTHER
INSTANCES I DID NOT EAT CERTAIN FOODS

BECAUSE I COULD NOT BE SURE IF IT WAS PORK OR
NOT.

5. THAT I AM SERVED BREAD FROM LOVE'S
BAKERY WHICH BASED ON INFORMATION AND
BELIEF, CONTAINS "LARD" WHICH IS A PORK BI-
PRODUCT, AND THAT I DO NOT RECEIVE ANY
INFORMATION FROM RELIABLE SOURCES OF THE
FOODS THAT ARE SERVED TO ME CONTAIN PORK
OR A BI-PRODUCT OF PORK.

6. THAT BASED ON PERSONAL KNOWLEDGE
FROM WHEN I WORKED IN THE KITCHEN HERE IN
H.H.S.F. FOR TEN (10) MONTHS, THAT FOODS ARE
COOKED, EITHER PORT OR NON-PORK, WITH THE
SAME UTENSILS AND COOKING FACILITIES I.E.
GRILL, OVEN, STOVE, WITHOUT SUFFICIENT CLEAN-
ING, NOR AM I ALLOWED TO INSPECT THE KITCHEN
TO SEE IF MY FOOD IS BEING PREPARED WITHOUT
VIOLATION OF MY RELIGIOUS BELIEFS.

7. THAT I AM DENIED BY THE DEFENDANTS TO
PARTICIPATE IN JUMU'AH, WHICH IS THE FRIDAY
CONGREGATIONAL PRAYER THAT IS MANDATORY
FOR ALL MUSLIMS.

8. THAT I AM DENIED BY THE DEFENDANTS TO
HAVE RELIGIOUS COUNSELLING WITH MY MUSLIM
RELIGIOUS LEADER NAMED SAEED RASOOL.

9. THAT I AM A NEWLY CONVERTED BLACK
MUSLIM AND THAT I TAKE MY RELIGIOUS BELIEFS
IN ISLAM VERY SERIOUSLY, EVER SINCE I HAVE DIS-
COVERED FOR MYSELF THAT ISLAM IS THE TRUE

RELIGION OF GOD (ALLAH), AND THAT I AM WILLING TO LAY DOWN MY LIFE FOR ISLAM! ALL PRAISES DUE TO ALLAH

10. THAT I AM ALSO BEING CONSTANTLY HARASSED FOR BEING A MUSLIM BY THE DEFENDANTS AS LISTED IN MY AMENDED COMPLAINT.

FURTHER AFFIANT SAYETH NAUGHT.

DATED: HONOLULU, HAWAII FEBRUARY 21, 1989

/s/ DeMONT R.D. CONNER
DeMONT R.D. CONNER
 PRO SE
 99-902 MOANALUA HWY.
 AIEA, HAWAII 96701

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.
 SIGNED THIS 21ST DAY OF FEBRUARY, 1989.

/s/ DeMONT R.D. CONNER

IN THE UNITED STATES DISTRICT COURT FOR THE
 DISTRICT OF HAWAII

[Caption Omitted In Printing]

AFFIDAVIT OF DeMONT R.D. CONNER

(Filed Mar. 3, 1989)

STATE OF HAWAII)
) SS.
 CITY AND COUNTY OF)
 HONOLULU

I, DeMONT R.D. CONNER, BEING FIRST DULY SWORN ON OATH, DEPOSES AND SAYS:

1. THAT I AM THE PLAINTIFF IN THE ABOVE-ENTITLED MATTER AND I AM PROCEEDING IN PRO SE (COUNSEL) AND I DO MAKE THIS DECLARATION IN SUPPORT OF MY MOTION FOR A PRELIMINARY INJUNCTION.

2. THAT I HAVE BEEN DENIED, SINCE FEBRUARY OF 1987, THE RIGHT TO HAVE EDUCATIONAL CORRESPONDENCE COURSES WHILE IN MODULE "A", BECAUSE THE DEFENDANTS USE IT AS A FORM OF PUNISHMENT AND DISCRIMINATE AGAINST VARIOUS MODULE INMATES TO PROMOTE THEIR BEHAVIOR MODIFICATION SYSTEM.

FURTHER AFFIANT SAYETH NAUGHT.

DATED: HONOLULU, HAWAII FEBRUARY 28, 1989

/s/ DeMONT R.D. CONNER
DeMONT R.D. CONNER
 PRO SE
 99-902 MOANALUA HWY.
 AIEA, HAWAII 96701

I DECLARE UNDER PENALTY OF PERJURY THAT THE
 FOREGOING IS TRUE AND CORRECT. SIGNED THIS
28TH DAY OF FEBRUARY, 1989.

/s/ DeMONT R.D. CONNER
DeMONT R.D. CONNER
 PRO SE

IN THE UNITED STATES DISTRICT COURT FOR THE
 DISTRICT OF HAWAII

[Caption Omitted in Printing]

AFFIDAVIT OF DeMONT R.D. CONNER

(Filed Mar. 8, 1989)

STATE OF HAWAII)
 CITY AND COUNTY OF) SS.
 HONOLULU)

I, DeMONT R.D. CONNER, BEING FIRST DULY
 SWORN ON OATH DEPOSES AND SAYS:

1. THAT I AM THE PLAINTIFF IN THE ABOVE
 ENTITLED MATTER AND I AM PROCEEDING IN PRO
 SE (COUNSEL) AND I DO MAKE THIS DECLARATION
 IN SUPPORT OF MY MOTION FOR A PRELIMINARY
 INJUNCTION.

2. THAT THE DEFENDANTS' BEHAVIOR MOD-
 IFICATION SYSTEM FORMERLY CALLED: "SEGREGA-
 TION AND MAXIMUM CONTROL PROGRAM", HAS
 FOUR SEQUENTIAL GRADIENTS OF PROGRAMMING:
 PHASE 1; MODULES "A"; "B"; AND "C".

3. THAT DEFENDANTS BEHAVIOR MODIFICA-
 TION SYSTEM HAS NOT BEEN APPROVED BY THE
 GOVERNOR FOR THE STATE OF HAWAII SEE ALSO A
 TRUE AND CORRECT COPY OF AN AFFIDAVIT LAW-
 RENCE SHOHEIT, ATTACHED AS EXHIBIT "B".

4. THAT DEFENDANTS BEHAVIOR MODIFICA-
 TION SYSTEM IS A "RULE" THAT GOVERNS THE
 HALAWA HIGH SECURITY FACILITY.

5. THAT HALAWA HIGH SECURITY FACILITY IS AN "AGENCY" UNDER HAWAII STATE LAW.

6. THAT HALAWA HIGH SECURITY FACILITY IS A "FACILITY" GOVERNED BY CORRECTIONS DIVISION.

7. THAT BOTH STATE LAW AND CORRECTIONS DIVISION REGULATIONS PROHIBIT THE USE OF "RULES" NOT MADE IN ACCORDANCE WITH STATE LAW.

8. THAT CORRECTIONS DIVISION REGULATIONS PROHIBIT THE USE OF PUNISHMENT FOR LONGER THAN 60 DAYS UNLESS WITH THE EXPRESS WRITTEN APPROVAL OF THE CORRECTIONS DIVISION ADMINISTRATOR.

9. THAT CORRECTIONS DIVISION REGULATION REQUIRES THAT INMATES BE GIVEN NOTICE, AT LEAST 24 HOURS IN ADVANCE, FOR HEARINGS; TO HAVE SUBSTITUTE COUNSEL, CROSS EXAMINE ANY ADVERSE WITNESSES; AN OPPORTUNITY TO PRESENT EVIDENCE IN DEFENCE [sic]; AND TO SEEK ADMINISTRATIVE REVIEW OF ADVERSE FINDINGS, BEFORE PUNITIVE SANCTIONS MAY BE IMPOSED.

10. THAT CORRECTIONS DIVISION REGULATION REQUIRES A REVIEW NO LESS THAN 30 DAYS WHILE IN PUNITIVE CONFINEMENT.

11. THAT WHILE IN PHASE I, I AM NOT GIVEN: (1.) NOTICE OF HEARING; (2.) THE RIGHT TO CROSS-EXAMINE ANY ADVERSE WITNESSES; (3.) THE OPPORTUNITY TO PRESENT EVIDENCE [sic] IN MY

DEFENSE; (4) THE OPPORTUNITY TO EMPLOY SUBSTITUTE COUNSEL; (5.) NOR THE OPPORTUNITY TO SEEK ADMINISTRATIVE REVIEW.

12. THAT I AM NOT GIVEN ANY WRITTEN SUMMARY THAT WAS RELIED UPON FOR ANY ADVERSE FINDING AND I AM NOT PERMITTED TO REVIEW THE INVESTIGATION REPORT UNDER NO CIRCUMSTANCES, WHEN I'M GIVEN MY PHASE ONE REVIEWS.

13. THAT PHASE 1 STATUS, IS THE ONLY TIME I'M GIVEN ANY PERIODIC REVIEWS. I AM NOT GIVEN ANY PERIODIC REVIEWS IN MODULES "A", "B", OR "C".

14. THAT I HAVE NEVER RECEIVED ANY NOTICE THAT THE DEFENDANTS SOUGHT THE "EXPRESS WRITTEN APPROVAL FROM THE CORRECTIONS DIVISION ADMINISTRATOR "BEFORE THEY PUNISHED ME IN PUNITIVE ISOLATION CONFINEMENT FOR LONGER THAN 60 DAYS SINCE I FIRST CAME TO HALAWA HIGH SECURITY FACILITY IN SEPTEMBER 3, 1985.

15. THAT WHILE IN PHASE 1 STATUS OR MODULE "A", I AM NOT ALLOWED TO HAVE CORRESPONDENCE COURSES, WHICH EFFECTIVELY DENIES "A RIGHT TO EDUCATION".

16. THAT WHILE IN PHASE 1 AND MODULE "A", I AM NOT ALLOWED TO HAVE CORRESPONDENCE COURSES, WHICH EFFECTIVELY DENIED "A RIGHT TO EDUCATION".

17. THAT PHASE 1 STATUS HAS A DETRIMENTAL EFFECT ON MY PAROLE AND OR MINIMUM REDUCTION HEARING.

18. THAT EXCEPT FOR (1) ONE TELEPHONE CALL AND (1) EXTRA VISITING PRIVILEGE, PHASE 1 AND DISCIPLINARY SEGREGATION ONE AND THE SAME - VIRTUALLY.

19. THAT I AM SUBJECTED TO DO 60 TO 120 DAYS ON PHASE 1.

20. THAT IF I RECEIVE ANY DISCIPLINARY SEGREGATION TIME WHILE I AM ON PHASE 1 STATUS, I - WILL HAVE TO START MY PHASE 1 TIME ALL OVER AGAIN AFTER ANY DISCIPLINARY SANCTION.

21. THAT AS OF RIGHT NOW I AM JUST STARTING MY PHASE 1 STATUS, AGAIN, AFTER I RECEIVE A 14 DAY MODERATE MISCONDUCT WHICH ENDED MARCH 6, 1989, AND EVEN THOUGH I DID 40 DAYS ON PHASE 1 STATUS, AND WHICH MY 40 DAYS ARE NOT CREDITED TO MY PRESENT STATUS.

22. THAT I HAVE BEEN IN PUNITIVE ISOLATION CONFINEMENT SINCE APRIL 22, 1988, AND THAT NONE OF THE INFRACTIONS THAT I ALLEGEDLY COMMITTED, ACTUALLY HAVE ANY BEARING ON PHASE 1 STATUS, BECAUSE IF I SHOULD EVER COMPLETE THAT 120 DAYS ON PHASE 1 STATUS, I WOULD BE ALLOWED TO RETURN TO GENERAL POPULATION IN MODULE "2".

23. THAT NONE OF THE DEFENDANTS ARE LICENSED [sic] TO PRACTICE PSYCHOLOGY IN THE STATE OF HAWAII.

24. THAT DEFENDANTS' BEHAVIOR MODIFICATION SYSTEM IS BASED ON "OPERANT CONDITIONING".

25. THAT I FIND MYSELF EDGY OFTEN, ARGUMENTATIVE, AND FRUSTRATIVE BY THE WAY THE DEFENDANTS APPLY THEIR BEHAVIOR MODIFICATION SYSTEM UPON ME, WHICH I CAN SEE FROM CORRECTING DIVISION RULES AND REGULATIONS, STATE LAW, FEDERAL CASE LAW AND THE CONSTITUTION OF THE UNITED STATES, THAT THE DEFENDANTS ACTION IN APPLY [sic] THEIR SYSTEM IS ARBITRARY AND PURPOSELESS.

26. THAT I CONSTANTLY HAVE TO YELL, SCREAM, KICK ON MY DOOR AND PUNCH MY MATTRESS TO LET OUT MY FRUSTRATIONS THAT I FEEL FROM BEING PUNISHED ALL THE TIME, ESPECIALLY FOR THE VAGUE AND OVERLY BROAD RULES THAT THE DEFENDANTS ENFORCE.

27. THAT THE DESCRIBED ENFORCEMENT OF DEFENDANTS INVALID BEHAVIOR MODIFICATION SYSTEM BY DEFENDANTS, HAVE RESULTED IN A GRIEVOUS LOSS OF MY STATE-CREDITED LIBERTY INTEREST, DEMORALIZATION OF MY MENTAL ATTITUDE, UNFAIR AND ARBITRARY MASS PUNISHMENT AGAINST PLAINTIFF IN EVERY STEP OF DEFENDANTS PHASE PROGRAM.

28. THAT DEFENDANTS DO NOT EVEN SUPPLY PLAINTIFF WITH ANY WRITTEN CRITERIA THAT I NEED TO FOLLOW IN ORDER TO BE REMOVED FROM THEIR ARBITRARY AND PURPOSELESS BEHAVIOR MODIFICATION SYSTEM.

FURTHER AFFIANT SAYETH NAUGHT.

DATED: HONOLULU, HAWAII, MARCH 6, 1989.

/s/ DeMONT R.D. CONNER
DeMONT R.D. CONNER,
 PRO SE
 99-902 MOANALUA HWY.
 AIEA, HAWAII 96701

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. SIGN THIS 6TH DAY OF MARCH 1989.

/s/ DeMONT R.D. CONNER
DeMONT R.D. CONNER
 PRO SE

IN THE UNITED STATES DISTRICT COURT FOR THE
 DISTRICT OF HAWAII

[Caption Omitted in Printing]

AFFIDAVIT OF DeMONT R.D. CONNER

(Filed Apr. 6, 1989)

STATE OF HAWAII)
) SS.
 CITY AND COUNTY OF)
 HONOLULU

I, DeMONT R.D. CONNER, UNDER PENALTY OF PERJURY HEREBY STATES AND AVERS:

1. THAT I AM THE AFFIANT IN THE ABOVE-ENTITLED ACTION AND THAT I MAKE THIS AFFIDAVIT IN SUPPORT OF MY MOTION FOR PRELIMINARY INJUNCTION AND IS ALSO MADE IN GOOD-FAITH.

2. THAT I AM SUBJECTED TO DEFENDANTS EXCESSIVE USE OF MECHANICAL RESTRAINTS FOR ALL OUT-OF-CELL MOVEMENTS OTHER THAN TO THE RECREATION YARD, SHOWERS, AND DAILY MEDICATION.

3. THAT DEFENDANTS USE OF MECHANICAL RESTRAINTS CONSISTS OF HAND-CUFFS OR WAIST-CHAINS WITH HAND-CUFFS ATTACHED TO THE WAIST-CHAINS, AND LEG-IRONS KNOWN AS "SHACKLES", THE SHACKLES CONSISTS OF LOOPS AROUND EACH ANKLE CONNECTED BY A CHAIN AND A DELIBERATELY PLACED KNOT IN THE MIDST OF THE CHAIN, WHICH SHORTENS THE LENGTH OF

THE CHAIN AND STRIDE OF THE PERSON WEARING THE SHACKLES.

4. THAT ONLY INMATES CONFINED IN THE SPECIAL HOLDING UNIT OF HALAWA CORRECTIONAL FACILITY ARE SUBJECTED TO THE EXCESSIVE USE OF MECHANICAL RESTRAINTS, REGARDLESS OF THE OFFENSE OR STATUS OF THE INMATE CONFINED THEREIN.

5. THAT THE EXCESSIVE USE OF MECHANICAL RESTRAINTS IS INTENDED FOR PUNISHMENT PURPOSES AND TO PROMOTE ADVANCEMENT IN THE DEFENDANTS BEHAVIOR MODIFICATION SYSTEM.

6. THAT THE EXCESSIVE USE OF MECHANICAL RESTRAINTS PROMOTES WITHIN MYSELF A FEELING OF HARASSMENT, INTIMIDATION, AND UNDUE PUNISHMENT BEING DONE AGAINST ME BY DEFENDANTS, AND IN TURN I GAIN WHOLESOME RESENTMENT, SPITE, AND DISRESPECT TOWARDS DEFENDANTS, FOR THEIR OBVIOUS ABUSE OF THEIR AUTHORITY AND DISCRETION.

7. THAT I AM ALSO SUBJECTED TO DEFENDANTS MANDATORY STRIP-SEARCH PROCEDURE WHICH IS EXCESSIVE AND ARBITRARY.

8. THAT I AM STRIP-SEARCH [sic] EVERY TIME I LEAVE MY CELL TO GO OUT OF MY HOUSING UNIT, WHICH IS MOSTLY AN INTER FACILITY MOVEMENT, AND I AM STRIP-SEARCHED EVERY TIME I RETURN TO MY CELL FROM AN OUT-OF-HOUSING MOVEMENT WHICH ALSO INCLUDES RECREATION.

9. THAT I HAVE A DOCUMENTED HISTORY WHERE I WAS SUBJECTED TO UNREASONABLE STRIP-SEARCHES WHICH WERE CONDUCTED OUTSIDE OF PRISON POLICY AND PRACTICES, AND OF WHICH CAUSED ME UNDUE EMBARRASSMENT, HUMILIATION AND INTIMIDATION AS I FELT FEAR OF BEING PHYSICALLY ABUSED, OR A LOSS OF A PRIVILEGE AS DESCRIBED BELOW.

10. THAT ON THE 4TH DAY OF MAY 1988; I WAS ORDERED TO STRIP IN FRONT OF AT LEASE [sic] 30 INMATES WHILE I WAS AT THE HALAWA MEDIUM SECURITY'S FACILITY SPECIAL HOLDING UNIT WHEN I WAS RETURNING FROM THE RECREATION YARD NUMBER 4 INSTEAD OF FOLLOWING PROCEDURES THAT HAD REQUIRED PRISON OFFICERS TO STRIP-SEARCH INMATES IN THE RECREATION YARD AFTER THE RECREATION PERIOD WAS OVER A.C.O.'S JOHN RODRIGUEZ AND MIKE MIYAMOTO ORDERED ME OUT OF RECREATION YARD NUMBER 4, THAT RIGHT THERE IN THE WALKWAY PRECEEDING THE RECREATION YARDS AND IN CLEAR VIEW OF INMATES IN THE CELLS DIRECTLY IN FRONT OF ME, I WAS ORDERED BY THE A.C.O.'S TO "STRIP", THEN AFTER I RELUCTANTLY STRIPPED OF MY CLOTHES, I WAS ORDERED TO GO THROUGH THE ENTIRE STRIP-SEARCH PROCEDURE WHERE ALL THE INMATES IN THE CELLS WHO COULD SEE ME HAD THE OPPURTUNITY [sic] TO SEE ME. I HAD PROTESTED, BUT THE A.C.O.'S WOULD HAVE NONE OF IT. THEN WHEN I WAS RETURNED TO MY CELL, I IMMEDIATELY WROTE OUT MY GRIEVANCE WHILE I

CRIED FROM THE HUMILIATION I HAD JUST SUFFERED.

11. THAT ON THE 7TH DAY OF DECEMBER 1988, WHILE I WAS TOLD BY A.C.O. ABRAHAM LOTA TO "STRIP" AND MADE TO GO THROUGH THE ENTIRE STRIP-SEARCH PROCEDURE, I WAS ORDERED BY A.C.O. LOTA TO REMOVE MY FALSE TOOTH AT WHICH TIME A.C.O. LOTA INSTRUCTED A.C.O. GAGO TO GIVE ME THE NAPKIN SO I CAN REMOVE MY TOOTH, BUT I REFUSED AND EXPLAINED TO A.C.O. LOTA THAT (DEFENDANT) CINDA SANDIN HAD INFORMED ME THE DAY BEFORE VIA GRIEVANCE RESPONSE THAT "STAFF HAS BEEN INFORMED TO DISCONTINUE THAT PRACTICE" OF REQUIRING ME TO REMOVE MY "DENTAL APPLIANCE." BUT, A.C.O. LOTA, WHOM WAS ALSO WORKING ON THAT DAY AND SHIFT THAT I WAS GIVEN MY GRIEVANCE RESPONSE, REFUSED TO ACCEPT MY STATEMENT AND INSTEAD TOLD ME THAT I WILL NOT BE GETTING BACK MY CLOTHES UNTIL I COMPLY WITH HIS ORDER. BUT, I TOOK EVERY STRENGTH I HAD AND STOOD MY GROUND BECAUSE I WAS TIRED OF BEING HARASSED BY A.C.O. LOTA AND I KNEW THAT THIS TIME HIS SUPERIORS WOULD FINALLY BELIEVE ME THAT HE WAS HARASSING ME, BECAUSE I HAD IT IN "BLACK AND WHITE" THAT WHAT HE (A.C.O. LOTA) WAS DOING WAS CONTRARY TO WHAT HE WAS TOLD NOT TO DO. BUT HIS SUPERIORS VIRTUALLY IGNORED MY COMPLAINT VIA GRIEVANCE PROCEDURE, AND A.C.O. LOTA MADE ME STAND THERE

FOR WHAT SEEMED LIKE HOURS, BUT WAS ACTUALLY ABOUT 10 TO 15 MINUTES, TOTALLY NAKED WHILE TELLING ME THAT I SHOULD JUST MAKE IT EASIER ON MYSELF AND DO AS HE SAID, BUT I REFUSED AND TOLD HIM HE SHOULD JUST WRITE ME UP FOR DISOBEYING HIS ORDER IF HE FEELS I AM WRONG, AND I [sic] ONE POINT I HAD SCREAM [sic] TO THE TOP OF MY LUNGS CALLING FOR HELP WHEN A.C.O. LOTA MADE A MOVE TOWARDS ME LIKE HE WAS GOING TO HIT ME, WHEREBY I QUICKLY SQUATTED DOWN TO DEMONSTRATE MY FEAR OF HIM, JUST SO HE WOULDN'T HARM ME, AND I PICKED UP MY PLEAS EVEN MORE SO FOR HIM TO JUST GIVE ME BACK MY CLOTHES. I WAS SHAKING AS FEAR RAN THROUGH MY BODY AS I REGRETTED GOING TO RECREATION THAT DAY, THEN EVENTUALLY A.C.O. LOTA GAVE ME BACK MY CLOTHES AND I WAS ALLOWED TO RETURN TO MY CELL AND I THANKED ALLAH FOR ALLOWING ME TO RETURN TO MY CELL WITHOUT BEING PHYSICALLY ABUSED AND I CRIED.

11. THAT ON THIS SAME DAY 7TH OF DECEMBER 1988, I CALLED MR. DANIEL R. FOLEY ESQUIRE TO TELL HIM OF THE HORROR I HAD JUST BEEN THROUGH BECAUSE IT WAS MR. FOLEY WHO HELPED ME PUT A STOP TO DEFENDANTS POLICY WHICH REQUIRED ME TO REMOVE MY FALSE TOOTH, BUT HE WAS NOT IN HIS OFFICE SO I REPORTED MY COMPLAINT TO "TONY" WHO IS MR. FOLEY'S SECRETARY, AND "TONY" AFTER GETTING ME TO CALM DOWN EXPLAINED TO ME THAT HE WILL BRING MY COMPLAINT TO MR. FOLEY AS

SOON AS MR. FOLEY RETURNS. I STATED TO TONY THAT I AM NOT GOING TO RECREATION AGAIN BECAUSE I DON'T WANT TO HAVE TO GO THROUGH THAT HORROR AGAIN, BUT TONY WHO GAVE ME WORDS OF COURAGE STATED THAT THAT'S PROBABLY WHAT THE A.C.O.'S WANT ME TO DO, SO I SHOULD JUST BE STRONG AND NOT LET THEM STOP ME FROM GOING TO RECREATION, SO I TOOK HIS ADVICE.

12. THAT ON DECEMBER 15, 1988, I WAS AGAIN CAUGHT WITH MY CLOTHES OFF, AFTER A.C.O. BRIAN LEE (WHOM IS ONE OF THE MAIN A.C.O.'S WHO HARRASSES [sic] ME ETC. SEE AMENDED COMPLAINT) ORDERED ME TO "STRIP" AND HAD ME GO THROUGH THE STRIP-SEARCH PROCEDURE AND TOLD ME THAT I MUST REMOVE MY FALSE TOOTH, BUT AS WITH A.C.O. LOTA I EXPLAINED THAT THIS PROCEDURE WAS DISCONTINUED AND THAT I WOULD LIKE TO HAVE MY CLOTHES BACK, BUT A.C.O. LEE REFUSED AND TOLD ME TO JUST DO IT. SO, DUE TO THE FACT THAT HE HELD THE LAW LIBRARY OVER ME TO COMPLY OR IT WOULD BE CANCELLED, AND DUE TO THE FACT THAT I NEEDED TO GO TO THE LAW LIBRARY, I FORCED MYSELF TO GRAB TOILET TISSUE AND USED IT TO PULL OUT MY FALSE TOOTH SO HE COULD INSPECT IT AND MY MOUTH, AT WHICH TIME I WAS GIVEN BACK MY CLOTHES AND ALLOWED TO GO TO THE LAW LIBRARY. [NOTE: A.C.O. BRIAN LEE NEVER ACTUALLY SPOKE THE WORDS THAT I WOULD HAVE MY LIBRARY VISIT CANCELLED IF I DID NOT COMPLY, BUT HIS TACIT ACTIONS MADE ME

STRONGLY FEEL THAT WAY.] ALSO, I FILED A GRIEVANCE ON A.C.O. BRIAN LEE'S ACTIONS IN THIS INSTANCE, BUT, THIS COMPLAINT TOO WAS VIRTUALLY IGNORED.

13. THAT ON AUGUST 13, 1987, I WAS HARASSED BY THE THEN A.C.O. GORDON FURTADO, WHEN HE MADE ME REPEAT THE STRIP-SEARCH PROCEDURE, WHICH LEFT ME FEELING LIKE I WAS BEING TREATED AS A DOG. THIS WAS DONE WHILE I WAS GOING TO SEE MY FORMER RELIGIOUS COUNSELOR, MR. HENRY CHEE, AND I HAD BEEN SEEING MR. CHEE AT THAT POINT IN TIME NEARLY 2 YEARS AND I HAVE NEVER HAD BEEN STRIP-SEARCHED BEFORE GOING TO SEE MY FORMAL RELIGIOUS LEADER, (CHRISTIAN). BUT AFTER I WAS ALLOWED TO PUT BACK ON MY CLOTHES I WAS TOLD BY THE THEN, SERGEANT WILLIAM SUMMERS TO RETURN TO MY CELL AND I WAS'NT EVEN TOLD WHY, NEITHER, WAS I TOLD WHY MY RELIGIOUS COUNSELING WAS CANCELLED. UNTIL I FOUND OUT VIA GRIEVANCE RESPONSE THAT "SGT. SUMMERS, FELT THAT THE PROBLEM WAS ESCALATING SO YOU WERE RETURNED TO YOUR CELL", AND I STRONGLY FELT THAT I WAS BEING HARASSED BECAUSE JUST THE DAY BEFORE THE INCIDENT I HAD CALLED THE FEDERAL BUREAU OF INVESTIGATIONS TO COMPLAIN ABOUT SGT. SUMMERS HARASSING ME FOR MY JAIL-HOUSE LAWYER, ACTIVITIES.

14. THAT THIS INCIDENT DESCRIBED IN AFFIDAVIT OATH NUMBER 13, WAS WHAT LED TO MY BEING CHARGED WITH MISCONDUCT AND FOR

WHICH LATER RESULTED IN ME FILING MY ORIGINAL COMPLAINT IN THE ABOVE-ENTITLED ACTION, AND OF WHICH JUST TWO MONTHS AFTER I FILED MY ORIGINAL COMPLAINT, THE MISCONDUCT CHARGE WAS EXPUNGED FROM MY RECORD, EVEN AFTER I WAS DENIED SUCH RELIEF ON 3 STEPS OF APPEAL VIA GRIEVANCE PROCEDURE, BUT I WAS STILL MADE TO DO THE DISCIPLINARY SANCTION OF 30 DAY IN PUNITIVE ISOLATION WHICH LED TO 6 MONTHS.

15. I AM ALSO SUBJECTED TO STRIP-SEARCHED IN FRONT OF OTHER INMATES IN GENERAL POPULATION WHEN GOING TO AND COMING FROM RECREATION.

16. THAT I AM HUMILIATED EVERY TIME I HAVE TO STRIP IN FRONT OF OTHER INMATES AND A.C.O.'S, WHICH IS DUE IN GREAT DEAL TO THE HORRIBLE SCARS I BEAR ON MY WAIST AND RIGHT HIP WHICH SUBJECTS ME TO GAZES AS IF I AM FREAK, AND QUESTIONS ABOUT ITS OCCURRENCE [sic]. I WAS CURSED AT THE AGE OF SEVEN TO BEAR THESE HORRIBLE SCARS FOR THE REST OF MY LIFE WHEN STEAMING HOT WATER, CAME POURING DOWN ON ME FROM THE KITCHEN SINK, EVEN THOUGH MY CLOTHES, MY STOMACH, WAIST, RIGHT HIP, AND RIGHT THIGH WAS SEVERELY BURN TO THE 2ND DEGREE. THE NIGHTMARE IS RELIVED EVERY TIME I MUST RECOUNT ITS TRADEGY [sic].

17. THAT AS A MAXIMUM CUSTODY INMATE AND AN INMATE INCARCERATED IN THE HALAWA HIGH SECURITY FACILITY MY CONTACT WITH THE

PUBLIC IS VIRTUALLY NON-EXISTENT. ALL VISITS THAT ARE PRIVILEGE IN NATURE ARE NON-CONTACT E.G. FAMILY VISITS.

18. NON-CONTACT VISITS HELD IN A VISITING ROOM WHICH CONSISTS OF 12 BOOTHS THAT ARE COMPLETELY SEALED OFF FROM THE VISITOR'S ON THE OTHER SIDE BY A BULLET PROOF GLASS AND CONCRETE AND METAL PARTITIONS, WITH THE ONLY CONTACT BEING THROUGH A TELEPHONE.

19. THAT OFFICIAL VISITS AND RELIGIOUS VISITS ARE HELD IN INTERVIEW ROOMS THAT ARE DIRECTLY IN FRONT OF THE BUILDING CONTROL STATION WHICH MONITORS THE FACILITY FROM THE INSIDE.

20. THAT THE EXCESSIVE STRIP-SEARCHING IS CAUSING ME TO SUFFER MENTALLY AND EMOTIONALLY AND ALSO STRIPS ME OF MY DIGNITY.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ DeMONT R.D. CONNER
DeMONT R.D. CONNER
PRO SE
99-902 MOANALUA HWY.
AIEA, HAWAII 96701

DATED: HONOLULU, HAWAII, MARCH 30, 1989.
I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT, SIGNED THIS 30TH DAY OF MARCH 1989.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

ORDER REGARDING VARIOUS
MOTIONS AND TRIAL SETTING

(Filed May 26, 1989)

Plaintiff DeMont Conner is a pro se prisoner litigant presently incarcerated at the Halawa Medium Security Facility (HMSF). Plaintiff filed this 42 USC 1983 action on March 14, 1985 challenging the procedure in a disciplinary hearing where he alleges that he was denied the right to question a correctional officer, to review reports submitted on the charges, or to call witnesses on his behalf. He was subsequently sentenced to 60 days in the Special Holdings Unit of the HMSF.

I.

Conner filed a motion to amend the complaint on November 8, 1988 and another motion to amend the complaint on February 15, 1989. Conner by letter received on January 6, 1989 withdrew the November 8, 1988 motion to amend the complaint. Thus, the court will consider only the February 15, 1989 motion to amend the complaint.

In the proposed amended complaint Conner asserts claims against additional named defendants who are administrators of the State prison system and Halawa Correctional Facility (HCF) and correctional officers at

HCF and the Halawa High Security Facility (HHSF). Conner claims numerous constitutional and state law violations regarding the prison's Behavior Modification Program, and other matters including inadequate access to exercise and recreation, impermissible body searches, freedom of religion and association, and deliberate indifference to his medical needs. Conner seeks declaratory relief and damages.

In *Foman v. Davis*, 371 U.S. 178, 182 (1962) the Court stated, "in the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to opposing party by virtue of allowance of the amendment, etc. - the leave sought should, as the rules require, be freely given."

Accordingly, since none of the above factors are evident, *Conner's motion to amend the complaint is hereby granted*. The court notes that no opposition has been filed by defendants nor has a trial schedule been previously set.

II.

Conner has filed several motions for preliminary injunction filed on February 16, 23, and 24, 1989, March 3 and 8, 1989, and April 6 and 13, 1989. The motion for preliminary injunction filed on April 13, 1989 is a consolidation of the previous motions. Conner requests the court to set a hearing date on these motions, and states that defendants have not responded to any of the motions. Subsequently on May 2, 1989 Conner filed an

Amended Notice of Preliminary Injunctions which amends the motions filed on February 23, 1989 and April 13, 1989.

Although Conner requests an expedited hearing on these motions for preliminary injunction by way of an *ex parte* motion for shortening of time for such hearing, the court sets the following schedule for the filing of memoranda addressing the above-referenced motions for preliminary injunction:

- a) Defendants shall file their opposition memorandum no later than June 23, 1989; and
- b) Plaintiff may file a reply memorandum no later than July 5, 1989.

The court shall consider this matter a non-hearing motion, and after the expiration of the above-stated dates for the filing of memoranda the court will render a decision within a reasonable period of time. Thus, Conner's *ex parte* motion for shortening of time for a hearing on his motions for preliminary injunctions is hereby *denied*.

III.

Miscellaneous Motions

Conner filed a motion to compel production of documents and answers to request for interrogatories filed on January 3, 1989. Conner's motion merely states that he seeks an order from the court compelling defendants to comply with his discovery request of June 15, 1988. There is no factual support nor a copy of the request for production of documents and answer to interrogatories. Without

such information the court is unable to determine the relevancy of the information requested by Conner.

Fed.R.Civ.P. 7(b)(1) requires that a motion "state with particularity the grounds [for the motion], and shall set forth the relief or order sought. Local Rule 220-2 requires that a notice of motion be accompanied by an appropriate memorandum or brief or by affidavits or declarations under penalty or perjury sufficient to support any material factual contentions.

In light of the above, Conner's aforesaid motion to compel discovery is *denied without prejudice* and he may file a corrected motion to compel discovery unless the issue is rendered moot should defendants respond to his discovery requests.

Next, Conner filed a motion for ordering a trial scheduling conference on February 2, 1989. The court rather than conducting a scheduling conference hereby establishes the following trial schedule which shall govern the course of this action: 1) non-jury trial shall be on February 8, 1990 at 9:00 am; 2) all motions shall be filed and discovery notice by November 20, 1989; 3) pretrial statements shall be due on December 21, 1989; 4) a final pretrial conference shall be held on January 7, 1990 at 9:00 am; 5) disclosure of the name(s) and address(es) of expert witnesses(es) [sic] to be called, and the field of expertise and curriculum vitae for each expert, if any, shall be by September 6, 1989 for plaintiff and by September 13, 1989 for defendant; (7) simultaneous exchange of expert's report(s) shall be by October 9, 1989; (8) deposition of expert witness(es) shall be completed by October 31, 1989, and (9) all discovery must be completed and all

motions must be heard no later than 30 days prior to the scheduled trial date.

The pretrial statement shall contain a narrative written statement of the facts that will be offered by oral or documentary evidence at trial, a list of all exhibits to be offered into evidence at the trial, a list of the names and addresses of all witnesses, and a summary of the anticipated testimony of any witness who is presently incarcerated.

Failure to fully disclose in the pretrial statement the substance of the evidence to be offered at trial will result in the exclusion of that evidence at the trial. The only exceptions will be matters which the court determines were not discoverable at the time of the pretrial conference, privileged matter, and matter to be used solely for impeachment purposes.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 26, 1989.

/s/ Bert S. Tokairin
UNITED STATES
MAGISTRATE

EXHIBIT "06"

(Filed, Along With Exhibits "07"- "14", July 6, 1989)

[SEAL]

TELEPHONE
548-6446

THEODORE I. SAKAI
ADMINISTRATOR

STATE OF HAWAII
DEPARTMENT OF SOCIAL SERVICES AND HOUSING
CORRECTIONS DIVISION
P.O. Box 339
Honolulu, Hawaii 96309

April 7, 1986

The Honorable Daniel K. Akaka
Mainland Congress
House of Representatives
Washington, DC 20515

Dear Congressman Akaka:

This is to acknowledge your letter dated March 11, 1986 regarding Halawa High Security Facility (HHSF) inmate DeMont Conner.

Mr. Conner was transferred from the Oahu Community Correctional Center (OCCC) to the Halawa High Security Facility on September 3, 1985 due to his predatory and assaultive behavior. Since being transferred to HHSF, Mr. Conner has made a remarkable change in his attitude and behavior. According to staff accounts, Mr. Conner has adjusted favorably within the confines of HHSF and has engaged in religious counseling and higher education courses. Further reports indicate that Mr. Conner has progressed through the system to where he is now housed in the unit that provides inmate work-lines.

In view of Mr. Conner's remarkable social redemption while housed at Halawa High Security Facility, it would appear that his transfer to another correctional facility would not be deemed necessary or appropriate at this time.

Should you have any further questions, may I recommend that you contact Mr. Clayton Frank, Correctional Supervisor at HHSF. He would be best able to assist you in this matter.

Sincerely,

/s/ William Oku
for Theodore I. Sakai
Administrator

EXHIBIT "07"

State of Hawaii

DEPARTMENT OF SOCIAL SERVICES AND HOUSING
Corrections Division

Administrative Program Action

To: CONNERS, DeMont 576-98-9907 April 16, 1986
(Name) (No.) (Date)

Re: Results of administrative meeting on:

- ☐ Your Program Change Request
- ☒ Your Classification/Program Review
- ☐ Your Personal Request

The Program Committee of Module C has reviewed your progress and notes your present classification as S-4/Max. The committee would

like to commend you on your behavior and attitude as well as your work as a Module Floorboy. The committee is recommending your transfer to the kitchen workline.

Your immediate supervisor will be William Roy.

You will abide by the rules and regulations of the workline as well as those of the module and facility.

Starting Date: 4/17/86

You have/have not been medically cleared:

/s/ K.N. Yurfurth 4/16/86
Medical Staff date

I approve/disapprove recommendation:

/s/ Henry K. Piikina
Support Services
Administrator date

/s/ 4/16/86
(Chairman of Committee) (Date)

Receipt of Results:

/s/ DeMont R.D. Conner 4/86
(Inmate) (Date)

EXHIBIT "08"

State of Hawaii

DEPARTMENT OF SOCIAL SERVICES AND HOUSING
Corrections Division
MONTHLY WORK EVALUATION REPORT

Date: Month of May 1986Name of Inmate: CONNOR, DeMont

Numbers of days absent: 2 (excused)
None (unexcused)

Numbers of days tardy: None (excused)
None (unexcused)

Work Classification: Kitchen

Number of work projects assigned _____

Rate of Compensation: _____

DUTIES FOR WHICH
TRAINEDNUMBER OF HOURS

<u>All around worker</u>	<u>81</u>
_____	_____
_____	_____

Number of training phases completed: _____

RATING:

	No Eval- uation	Aver- Poor	Below Aver- age	Above Aver- age	Aver- age	Excel- lent
ATTEN- DANCE			X			
WORK- MANSHIP			X			
LEARNING SPEED			X			
APPLICA- TION of Instruc- tion to Work			X			
WORK ADJUST- MENT and Adaptability			X			
REGULAR- ITY of Output				X		
RELATION- SHIP with Other Workers					X	
RELATION- SHIP with Instructor					X	
APPLICA- TION of Time				X		

CARE OF
GOVERN-
MENT
PROPERTY

X

OVERALL
RATING

X

REMARKS: His work has been slacked off since he came back to work. He had to be told what to do. He only does so much unless you tell him.

This report was discussed with me.

Signature of inmate /s/ DeMont R.D. Conner

Signature of supervisor /s/ William P. Roy

EXHIBIT "09"

State of Hawaii

DEPARTMENT OF SOCIAL SERVICES AND HOUSING
Corrections Division
MONTHLY WORK EVALUATION REPORT

Date: Month of June 1986

Name of Inmate: CONNORS [sic], DeMont

Numbers of days absent: None (excused)
None (unexcused)

Numbers of days tardy: None (excused)
None (unexcused)

Work Classification: Kitchen worker

Number of work projects assigned _____
Rate of Compensation: _____

DUTIES FOR WHICH
TRAINED

NUMBER OF HOURS

<u>All around worker</u>	<u>105 hrs.</u>
_____	_____
_____	_____

Number of training phases completed: _____

RATING:

	No Evalu- ation	Aver- Poor	Below Aver- age	Above Aver- age	Aver- age	Excel- lent
ATTEN- DANCE						X
WORK- MANSHIP						X
LEARNING SPEED						X
APPLICA- TION of Instruc- tion to Work						X
WORK ADJUST- MENT and Adaptability						X
REGULAR- ITY of Output						X
RELATION- SHIP with Other Workers						X
RELATION- SHIP with Instructor						X
APPLICA- TION of Time						X

CARE OF
GOVERN-
MENT
PROPERTY

X

OVERALL
RATING

X

This report was discussed with me.

REMARKS: He is a very good and hard worker. He has a very good attitude and gets along very well with others. His performance meets all required. He always accept [sic] his work without any talk back. For this month he has done very well.

Signature of inmate /s/ DeMont R.D. Conner

Signature of supervisor /s/ William P. Roy

EXHIBIT "10"

State of Hawaii

DEPARTMENT OF SOCIAL SERVICES AND HOUSING
Corrections Division
MONTHLY WORK EVALUATION REPORTDate: Month of July 1986Name of Inmate: CONNOR, DeMontNumbers of days absent: None (excused)
None (unexcused)Numbers of days tardy: None (excused)
None (unexcused)Work Classification: Kitchen

Number of work projects assigned _____

Rate of Compensation: _____

DUTIES FOR WHICH
TRAINEDNUMBER OF HOURSAll around worker111

Number of training phases completed: _____

RATING:

	No Eval- ation	Aver- Poor	Below Aver- age	Above Aver- age	Aver- age	Excel- lent
ATTEN- DANCE						X
WORK- MANSHIP						X
LEARNING SPEED						X
APPLICA- TION of Instruc- tion to Work						X
WORK ADJUST- MENT and Adaptability						X
REGULAR- ITY of Output						X
RELATION- SHIP with Other Workers						X
RELATION- SHIP with Instructor						X
APPLICA- TION of Time						X

CARE OF
GOVERN-
MENT
PROPERTY

OVERALL
RATING

X

X

REMARKS: Conner is a very good and hard worker.
His attitude is very good. He gets along
well with others.

This report was discussed with me.

Signature of inmate /s/ DeMont R.D. Conner

Signature of supervisor /s/ William P. Roy

EXHIBIT "11"

State of Hawaii

DEPARTMENT OF SOCIAL SERVICES AND HOUSING
Corrections Division
MONTHLY WORK EVALUATION REPORT

Date: Month of August 1986

Name of Inmate: CONNOR, DeMont

Numbers of days absent: None (excused)
None (unexcused)

Numbers of days tardy: None (excused)
None (unexcused)

Work Classification: Kitchen

Number of work projects assigned _____
Rate of Compensation: _____

DUTIES FOR WHICH
TRAINED

NUMBER OF HOURS

All around worker

96 hrs.

Number of training phases completed: _____

RATING:

	No Evalu- ation	Aver- Poor	Below Aver- age	Above Aver- age	Aver- age	Excel- lent
ATTEN- DANCE						X
WORK- MANSHIP						X
LEARNING SPEED						X
APPLICA- TION of Instruc- tion to Work						X
WORK ADJUST- MENT and Adaptability						X
REGULAR- ITY of Output						X
RELATION- SHIP with Other Workers						X
RELATION- SHIP with Instructor						X
APPLICA- TION of Time						X

CARE OF
GOVERN-
MENT
PROPERTY

X

OVERALL
RATING

X

REMARKS: Conner is a good hard worker. He works with great pride. He gets along very well with others. Conner seems to always be very happy with his work. He always looks for better way [sic] to get the work done.

This report was discussed with me.

Signature of inmate /s/ DeMont R.D. Conner

Signature of supervisor /s/ William P. Roy

EXHIBIT "12"

State of Hawaii

DEPARTMENT OF SOCIAL SERVICES AND HOUSING
 Corrections Division
 MONTHLY WORK EVALUATION REPORT

Date: Month of September 1986Name of Inmate: CONNOR, DeMont
 Numbers of days absent: None (excused)
 None (unexcused)

 Numbers of days tardy: None (excused)
 None (unexcused)
Work Classification: Kitchen

Number of work projects assigned _____

Rate of Compensation: _____

DUTIES FOR WHICH
TRAINED

NUMBER OF HOURS

<u>All around worker</u>	<u>106</u>
_____	_____
_____	_____

Number of training phases completed: _____

RATING:

	No Evalu- ation	Aver- Poor	Below Aver- age	Above Aver- age	Aver- age	Excel- lent
ATTEN- DANCE						X
WORK- MANSHIP						X
LEARNING SPEED						X
APPLICA- TION of Instruc- tion to Work						X
WORK ADJUST- MENT and Adaptability						X
REGULAR- ITY of Output						X
RELATION- SHIP with Other Workers						X
RELATION- SHIP with Instructor						X
APPLICA- TION of Time						X

CARE OF
GOVERN-
MENT
PROPERTY

OVERALL
RATING

X

X

REMARKS: Conner is a very good worker. He works with lots of pride and gets along well with others.

This report was discussed with me.

Signature of inmate /s/ DeMont R.D. Conner

Signature of supervisor /s/ William P. Roy

EXHIBIT "13"

State of Hawaii

DEPARTMENT OF SOCIAL SERVICES AND HOUSING
Corrections Division
MONTHLY WORK EVALUATION REPORT

Date: Month of October 1986

Name of Inmate: CONNOR, DeMont

Numbers of days absent: None (excused)
None (unexcused)

Numbers of days tardy: None (excused)
None (unexcused)

Work Classification: Kitchen

Number of work projects assigned _____
Rate of Compensation: _____

DUTIES FOR WHICH
TRAINED

NUMBER OF HOURS

All around worker	149 hrs.
_____	_____
_____	_____

Number of training phases completed: _____

RATING:

	No Evalu- ation	Aver- Poor	Below Aver- age	Above Aver- age	Aver- age	Excel- lent
ATTEN- DANCE						X
WORK- MANSHIP						X
LEARNING SPEED						X
APPLICA- TION of Instruc- tion to Work						X
WORK ADJUST- MENT and Adaptability						X
REGULAR- ITY of Output						X
RELATION- SHIP with Other Workers						X
RELATION- SHIP with Instructor						X
APPLICA- TION of Time						X

CARE OF
GOVERN-
MENT
PROPERTY

X

OVERALL
RATING

X

X

REMARKS: He is a very good and hard worker. He gets along well with others, and works with lots of pride.

This report was discussed with me.

Signature of inmate /s/ DeMont R.D. Conner

Signature of supervisor /s/ William P. Roy

EXHIBIT "14"

State of Hawaii

DEPARTMENT OF SOCIAL SERVICES AND HOUSING
 Corrections Division
 MONTHLY WORK EVALUATION REPORT

Date: Month of December 1986Name of Inmate: CONNOR, DeMont
 Numbers of days absent: None (excused)
 None (unexcused)

 Numbers of days tardy: None (excused)
 None (unexcused)
Work Classification: Kitchen Worker

Number of work projects assigned _____

Rate of Compensation: _____

DUTIES FOR WHICH
TRAINED

NUMBER OF HOURS

<u>As assigned by supervisor</u>	<u>149 hrs.</u>
_____	_____
_____	_____

Number of training phases completed: _____

RATING:

	No Evalu- ation	Aver- Poor	Below Aver- age	Above Aver- age	Aver- age	Excel- lent
ATTEN- DANCE						X
WORK- MANSHIP					X	
LEARNING SPEED					X	
APPLICA- TION of Instruc- tion to Work					X	
WORK ADJUST- MENT and Adaptability					X	
REGULAR- ITY of Output					X	
RELATION- SHIP with Other Workers					X	
RELATION- SHIP with Instructor					X	
APPLICA- TION of Time					X	

CARE OF
GOVERN-
MENT
PROPERTY

X

OVERALL
RATING

X

REMARKS: He is a good worker and gets the job
done but tends to talk too much at times.
He has a good attitude.

This report was discussed with me.

Signature of inmate /s/ DeMont R.D. Conner

Signature of supervisor /s/ William P. Roy

EXHIBIT "36"

DEPARTMENT OF CORRECTIONS Institutions Division Halawa Correctional Facility

INMATE GUIDELINES

Segregation and Maximum Control Program (SMCP) High Security General Population

Inmates are subject to all State of Hawaii laws, Department of Corrections policies (handbook), and Halawa Correctional Facility (HCF) policies and procedures. Any deviation from these guidelines may be subject to a program hearing, disciplinary action and/or criminal charges.

The following are the guidelines for inmates programmed to the General Population phase of HCF:

SELF-REPRESENTATION

1. No inmate shall be allowed to govern or order another inmate.
2. There will be no group representation. All inmates will be self-represented.

FACILITY MOVEMENTS

3. Whenever an inmate is authorized to be moved out of the quad or module, that inmate shall be properly escorted by ACOs.
4. All inmates in the module shall be strip-searched upon leaving and returning to the module.
5. Inmates must be properly dressed in HCF uniform and footwear must be worn at all times when leaving the quad, except for

legitimate reasons. (Exceptions: Uniforms do not have to be worn at recreation and upon being escorted to court jury trials.)

QUAD MOVEMENTS

6. All quad doors shall remain locked at all times unless authorized or permitted to be opened by staff.
7. Only one inmate at a time shall normally be allowed out of his quad when authorized or permitted. (Exceptions: Recreation periods, crew workline duty, and library services.) While out of his quad, the inmate shall go directly to and from his authorized destination and not loiter, visit with other inmates, or in any way delay his return to his quad.
8. Inmates may be allowed freedom of movement within their assigned quads *during breakfast to 2:00 p.m. and dinner to 10:00 p.m.* Inmates will be in their assigned cells and cell doors will remain locked during the hours of *2:00 p.m. to dinner time and 10:00 p.m. to breakfast.* In Module A, inmates will be locked down from 10:00 p.m. to 10:00 a.m. and 2:00 p.m. to 6:00 p.m.
9. Prior to ACOs entering the quad, inmates will immediately return to their assigned cells. The television will be turned off during any lockdown and when an ACO enters the quad. At lunchtime, inmates will be locked down prior to ACOs placing food trays in the quadrants.

QUAD STANDARDS

10. Blankets, sheets, pillows, pillow cases, laundry bags, and mattresses shall be kept in the inmate's cell.
11. Upon any lockdown period, any personal property left in the dayroom and shower areas will be confiscated. A write-up will be issued.
12. Inmates are not allowed to lie down or sleep in the dayroom area. There will be no sitting on the tables.
13. Inmates will not climb walls or railings in the quadrants.
14. Inmates will not loiter on the stairway and/or walkways fronting the cells. They will not stand in front of other inmate's cell doors.
15. The program area in Quadrant 3 located on the upper level will be considered an unauthorized area; this includes the stairway leading to it.
16. Inmates are not authorized in another inmate's cell and inmates are not to allow other inmates into their cells.
17. Only one inmate shall shower at a time. Module A showers will promptly cease at 1:30 p.m. and 9:30 p.m. When the ACO orders lunch lockdown, showers will cease. Module B showers will promptly cease at 10:30 a.m., 1:30 p.m. and 9:30 p.m. Showers will resume upon the completion of the pickup of meal trays. Module C showers will be contingent on the inmate's workline.

18. There will be no exercising within quad areas except in the inmates' assigned cells.
19. No items shall be given to an ACO to be passed to another inmate.
20. No defacing of walls, windows, fixtures, and equipment. Nothing may be hung on the cell walls.
21. There will be no obstruction to the see-through glass (windows) on the cell and quad doors, windows, light fixtures, and vents.
22. Stringing of clothes lines shall not be permitted.
23. All dayroom lights and all cell lights will be turned off at 10:00 p.m. Lockdown will be completed by 10:00 p.m. All lights will be turned back on at 5:30 a.m.
24. Inmates are responsible for keeping their cells clean, orderly, and ready for inspection at all times.
25. The razor will be available for use daily as scheduled. Disposable razors shall be provided weekly by staff for each inmate's individualized use. Exceptions will be made for those scheduled for official appearances (i.e., Court, parole hearings, etc.)
26. Inmates shall not communicate with inmates from other quads.
27. Inmates shall not pass any items under their cell door and/or between quad doors to another inmate under any circumstances.

28. Inmates shall not use abusive or obscene language towards any staff member. Inmates shall not talk or make noise while staff members and visitors are in the inmate housing area.
29. Cardboard boxes, plastic containers, plastic bags, glass containers, cans, or any implement of storage shall not be permitted or stored in an inmate's cell. (Exception: Dentist/Unit Team approved containers for dentures.)
30. Inmates shall not save or store any empty cigarette packs, seeds, and chip packages, and candy wrappers, etc.
31. Jewelry and watches of any type shall not be permitted.
32. Radios, tape recorders, and all electronic entertaining devices shall not be permitted for personal retention.
33. Instruments of music shall not permitted.
34. No inmate shall have money in his possession. All money will be considered contraband and subject to confiscation. There will be no transferring of money from one HCF inmate account to another.
35. The toilet shall not be used as a disposal of discarded items. No item authorized for retention shall be flushed through the toilet except toilet paper.

MEALS

36. After meals, all trays will be put in an orderly fashion on the quad area table. Inmates will return to their assigned cells

for temporary lockdown while trays are being distributed and retrieved.

37. All meals will be consumed in the dayroom area and there will be no storing of food in the cell except for store order purchases, unless otherwise authorized.
38. Inmates will eat only the food items on their tray. There will be no giving, passing, switching, or taking of food from another inmate's tray.

AUTHORIZED ITEMS FOR RETENTION

39. Except for the items listed below, nothing else is permitted for retention by the inmate in his cell. All excess personal items will be kept in the inmate's property storage area until arrangements by the inmate can be made for them to be sent out of the facility (via, i.e., family, friends, or mail.)
 - a. One tube toothpaste (HCF issued or through inside store order only)
 - b. One toothbrush (HCF issued or through inside store order only)
 - c. One bar of soap (HCF issued)
 - d. One roll toilet paper
 - e. One comb (HCF approved)
 - f. One stick deodorant (HCF issued or through inside store order only)
 - g. One package of dental floss (through inside store order only, trade-for-trade basis)
 - h. One shampoo (through inside store order only)

- i. Two towels and two washcloths
- j. One mattress
- k. One blanket
- l. One sheet
- m. One pillow
- n. One pillow case
- o. One facility issued blanket pad
- p. Laundry bag (HCF issued)
- q. One pair slippers (HCF issued or through inside store only)
- r. One pair athletic shoes (through store order)
- s. Four issued T-shirts (white)
- t. Four undershorts (HCF issued or through store order only)
- u. Four pairs of socks (white athletic socks)
- v. One blue sweatshirt (through store order only, to be worn in the quadrant, no alteration)
- w. Uniform pants (Worklines-5 pairs, others-2 pairs)
- x. Uniform shirts (Worklines-5 pairs, others-2 pairs)
- y. Two pairs of shorts (athletic type, solid color, no pockets)
- z. One pencil

- aa. One pen (non-refillable ball point pen only)
- bb. Four sheets of writing paper (HCF issued with or without lines, i.e., typing paper not to exceed 8 1/2" x 11", indigent only)
- cc. One tablet of writing paper (HCF issued with or without lines, not to exceed 8 1/2" x 11" - issued through inside store order only. Indigent inmates with pending legal matters may request that a tablet be debited to their account. Cardboard will be removed.)
- dd. Two letter size envelopes (HCF issued - indigent)
- ee. One package of 75 letter size envelopes (through inside store order only)

Manila envelopes may be purchased or immediate use by inmates with pending legal cases. Indigent inmates with pending legal cases may request that the cost of the envelopes be debited to their account.
- ff. Stamps (limited to one book)
- gg. Four photographs (not to exceed 4" x 5")
- hh. Four incoming correspondence/letters
- ii. One *Inmate Handbook*

- jj. Reading materials (see #39)
- kk. Legal material (see #39)
- ll. One copy of "Inmate Guidelines for High Security General Population"
- mm. Three (3) daily newspapers

Authorized items for retention, as herein listed, shall not be altered or used other than the way they were intended to be used. All store ordered items shall be purchased on a trade-for-trade basis.

- 39. Inmates may possess four library books (dictionaries, recreational, or religious) and two religious pamphlets or brochures approved by the Chaplain. Inmates may possess two legal books or transcripts and six citations. Provisions may be made for inmates with pending legal cases to have additional access to materials. Inmates may be denied access to their legal materials for up to 15 days. Inmates in approved educational programs may have to additional books per program.
- 40. *Court clothes* will be permitted when necessary. They will consist of one (1) pair of dress slacks, one (1) dress shirt, one (1) pair of dress shoes, and one (1) pair of dress socks. They will be stored in the property room. Upon completion of the court case, the inmate must arrange to have the clothing sent out of the facility within 30 days.
- 41. All HCF-issued property is the inmate's responsibility. Any damage, loss, etc., to issued property may result in a misconduct

report being filed against the inmate assigned the property and may include his having to pay for the property.

PROHIBITED ITEMS

42. Anything not specifically authorized for possession, conveyance or introduction onto the HCF compound by the Facility Administrator shall be considered contraband. Inmates violating this section shall be subject to appropriate disciplinary sanctions which may include criminal charges.

COMMUNICATION

43. All requests will be in writing except for emergency situations.
44. Except in cases of medical emergency, all requests for medical attention must be in writing. No inmate shall possess any medication except as authorized by the medical unit with approval of Administration.
45. ACOs will accept requests from the inmates once daily in the morning.
46. Inmates shall communicate in the English language only; including telephone calls, visits and letters.

Exception: A written request must be submitted and approved by the Unit Manager for an inmate to speak a foreign language to a non-English speaking person which includes family members.

47. Any communication with ACOs from the quads will be done through the intercom system. Inmates will not bang on the doors to talk to ACOs.

VISITS

48. *Official visits* shall be permitted at any reasonable hour in accordance with applicable department and facility policies. Official visitors are encouraged to make prior appointments with the facility.
49. *Personal Visits* – Personal visit privileges shall ordinarily be limited to two (2) half-hour non-contact visits on weekends and one (1) half-hour non-contact visit on legal holidays as scheduled.

Special Personal Visits will be limited to off-island immediate family only. If they are unable to visit during regular visits as scheduled, they may request at least three days prior for a special visit. If approved by the United Manager, the special visit will be for one (1) hour duration during the weekdays during business hours. Airline tickets must be presented as verification of off-island status and the actual dates of stay on Oahu. Immediate family shall be defined as wife, mother, father, sister, brother, daughter, and son whether natural or hanai.

CORRESPONDENCE

50. Incoming or outgoing mail to and from inmates will be inspected and read. Privileged mail as described by the *Inmate Handbook* should normally be inspected for contraband in the presence of the inmate. Outgoing privileged mail will be stamped by the ACO. Incoming personal mail may be withheld from the inmate for up to 15 days and outgoing personal mail may be

restricted for up to 15 days in accordance with the provisions of the *Inmate Handbook*.

51. There is no restriction on *incoming personal letters* but inmates are allowed to keep only four (4) personal letters and four (4) photographs in their possession. Only personal letters may be received by inmates. All other items such as additional photographs, newspaper clippings, crossword puzzles, brochures, etc., will be placed into his property. Inmates may not enter contests through the mail.
52. Outgoing personal correspondence will not be limited except as above. The paper will be no longer than 8 1/2" x 11".
53. Inmates will be responsible for the purchase of writing materials and they are *only* purchasable through the inside store order.
54. All outgoing mail will be picked up from the quadrants, daily at lockdown; 10:00 p.m.

LIBRARY

55. Library services will be provided once a week per module.
56. There will be no returning of library books to any staff member other than the librarian. If an inmate receives an outside store order publication, it shall *not* be placed into his personal property if he is at the four (4) book limit. It is the inmate's responsibility to coordinate the ordering of publications and library to remain at the correct limit. No library books will be placed in personal property. There will be

no trading of library and personal books. Any books left in the dayroom area of the quad will be confiscated and given to the Case Manager.

LAUNDRY

57. Laundry services are provided twice a week as scheduled.
58. Blankets will be cleaned and mattresses will be sanitized at least once a month as scheduled.
59. All clothing will be marked by code to assure proper return after laundry days.

TELEVISION

60. Television privileges may be permitted during the hours of *breakfast to 2:00 p.m.* and *dinner to 10:00 p.m.* daily (Module A-10:00 a.m. to 2:00 p.m. and 6:00 p.m. to 10:00 p.m. for radios or televisions.)

TELEPHONE PRIVILEGES

61. *Personal* telephone calls will be limited to one (1) call a week. Duration is limited to ten (10) minutes per call as scheduled.
62. *Attorney Calls* - Inmates shall be permitted use of the telephone to contact their attorney once daily, except Saturday, Sunday, and holidays as time permits and limited to five (5) minutes per call. Each quad will be scheduled the use of the telephone.
63. *Ombudsman Calls* - Telephone calls to and from the Ombudsman shall be permitted at any reasonable hour without delay.

64. *Long Distance Calls* - Inmates may place long distance calls if they have sufficient funds in their spendable account. Inmates may place collect calls and they will be financially accountable if a later billing problem develops. Long distance and collect call requests must be submitted 24 hours prior to the call.

Exception: Module C - inmates may be approved by the Unit Team to accept one incoming long distance telephone call per month.

STORE ORDERS

65. Inmates shall be permitted one (1) *outside store order* per week as scheduled. Orders will be limited to \$10. Athletic shoes will be purchased separately through a request to the inmate store manager.
66. *Inside store orders* are permitted once a week as scheduled. Orders will be limited to \$15.
67. All personal items not issued will be bought through store order only.

EXERCISE PERIOD

68. Inmates shall be allowed to have a 60-minute indoor or outdoor exercise period on weekdays as scheduled excluding holidays, unless compelling security or safety reasons dictate otherwise.
69. The recreation yards have out-of-bounds areas marked with red lines. Inmates will remain within red areas.

70. Water fountain in the recreation yard shall not be used for the purpose of washing up, showering, or urination.

SMOKING PRIVILEGES

71. Cigarettes and tobacco smoking may be permitted, excluding pipes. These items may be purchased through inside store order only.
72. Inmates will not be allowed to take cigarettes out of the quad *unless* they are on worklines or have court appearances, outside appointments, etc. (Exception: Module floorboys are not permitted to take cigarettes to their workline areas.) Cigarettes will not be permitted in the law library.
73. Inmates are not allowed to smoke in the corridors while being escorted to and from their destination.
74. Any cigarettes taken out of the quad by the inmates will not be allowed back into the module.
75. Inmates will not request for cigarettes from staff. Cigarettes will be ordered through the inside store order only.

INCOMING/OUTGOING PERSONAL ITEMS

76. Court clothes may be brought in by family and friends on weekdays, except holidays, between 8:00 a.m. and 1:30 p.m. only, upon approval of the Unit Manager.
77. No books or magazines may be brought in via family and friends.

MONEY

78. *Incoming money* may be accepted through the mail in the form of money orders or cashier's checks only. Incoming money (money orders, cashier's checks, and cash) may be brought to the Medium Security Facility, Monday through Friday, 8:30 a.m. to 4:00 p.m. All money orders and cashier's checks should be made payable to the Halawa Correctional Facility with the name of the inmate shown on the check. *Personal checks will not be accepted at any time.*
79. *Outgoing money* - Inmates may make written requests to send their "spendable account" money out. The inmate is to state to whom the money is going, the amount, and the reason for the withdrawal. Upon approval by the Branch Administrator, a check will be given to the inmate's respective Case Manager for appropriate disposition.

GROOMING STANDARDS

80. Inmates are encouraged to shower and shave regularly.
81. Inmates are scheduled for haircuts regularly. Hair styles shall be in accordance with traditional standards of taste. The hair will be maintained in a neat and presentable fashion. Extreme hair styles such as mod styles or colors, unkempt hair, and exaggerated sideburns are unacceptable. Hair that is excessively long in the front, side, or back of the head is not considered appropriate. Hair length shall not touch the shoulders. "Shaved head" haircuts are not

allowed unless approved by the Branch Administrator or his designee.

82. Beards and mustaches may be allowed if they are short, clean, and groomed. Cleanliness, sanitation, security, and safety factors will be considered in determining appropriate hair, beard, and mustache styles.
83. Tattooing is prohibited.
84. Fingernails shall be maintained at a length that will not present a hazard to security and health.

These guidelines of the General Population of the HCF, may be revised, modified, or amended without notice from time to time, upon approval of the Branch Administrator.

Effective date of General Population Inmate Guidelines: Upon approval.

APPROVED:

/s/ William Oku
 William Oku,
 Branch Administrator
 11/28/88
Date

EXHIBIT "60"

DEPARTMENT OF CORRECTIONS
Institutions Division
Halawa Correctional Facility

INMATE GUIDELINES

Segregation and Maximum Control Program (SMCP)
Phase I

Inmates are subject to all State of Hawaii laws, Department of Corrections policies (handbook), and Halawa Correctional Facility (HCF) policies and procedures. Any deviation from these guidelines may be subject to a program hearing, disciplinary action and/or criminal charges.

The following are the guidelines for inmates programmed to Phase I of HCF:

SELF-REPRESENTATION

1. No inmate shall be allowed to govern or order another inmate.
2. There will be no group representation. All inmates will be self-represented.

MOVEMENTS

3. All cell doors shall remain locked at all times unless authorized or permitted to be opened.
4. Only one inmate at a time shall be allowed out of his cell when authorized or permitted. While out of his cell, he shall go directly to and from his authorized destination and not loiter, visit with other inmates, or in any way delay his return to his cell.

5. Whenever an inmate is authorized to be moved out of Special Holding, that inmate shall be leg-ironed and waist-chained at all times during his absence.
6. All inmates in Special Holding shall be strip-searched upon leaving and returning to Special Holding.
7. Inmates must be properly dressed in HCF uniform and footwear must be worn at all times when leaving Special Holding, except for legitimate reasons. (Exceptions: Uniforms do not have to be worn at recreation and upon being escorted to court jury trials.)

SPECIAL HOLDING STANDARDS

8. No defacing of walls, windows, fixtures, and equipment.
9. There will be no obstruction to the see-through glass (window) on the cell door, windows, light fixtures, and vents.
10. Stringing of clothes lines shall not be permitted.
11. Inmates shall not use abusive or obscene language towards any staff member. Inmates shall not talk or make noise while staff members and visitors are in the inmate housing area.
12. All dayroom lights and all cell lights will be turned off at 10:00 p.m. All lights will be turned back on at 5:30 a.m.
13. Inmates are responsible for keeping their cells clean, orderly, and ready for inspection at all times.

14. Razors will be available for use as scheduled. Exceptions will be made for those inmates scheduled for official appearances (i.e., Court, parole hearings, etc.) Inmates in Phase I shall normally be permitted to shave at least five times per week.
15. Television privileges shall not be permitted.
16. No item shall be given to a staff member to be passed to another inmate.
17. Blankets, sheets, pillows, pillow cases, and mattresses shall be kept in the inmate's cell and remain on the elevated concrete slab.
18. Inmates shall not pass or receive any items under their cell door to/from another inmate under any circumstance.
19. Cardboard boxes, plastic containers, plastic bags, glass containers, cans, or any implement of storage shall not be permitted or stored in an inmate's cell. (Exception: Dentist/Unit Team approved containers for dentures.)
20. Jewelry and watches of any type shall not be permitted.
21. Radios, tape recorders, and all electronic entertaining devices shall not be permitted.
22. Instruments of music shall not be permitted.
23. No inmate shall have money in his possession. All money will be considered contraband and subject to confiscation. There will be no transferring of money from one HCF inmate account to another.

24. The toilet shall not be used as a disposal for discarded items. No item authorized for retention shall be flushed through the toilet except toilet paper.
25. Inmates will not make unreasonable noise or harass others. They will not use abusive or obscene language or crude gestures to others which might provoke a response.

MEALS

26. After each meal, all trays will be put in an orderly fashion outside of the cell. *No food will be stored in the cell.*

AUTHORIZED ITEMS FOR RETENTION

27. Except for the items listed below, nothing else is permitted for retention by the inmate in his cell. All excess personal items will be kept in the inmate's property storage area until arrangements by the inmate can be made for it to be sent out of the facility (via, i.e., family, friends, or mail.)
 - a. One tube toothpaste (HCF issued or through inside store order only)
 - b. One toothbrush (HCF issued or through inside store order only)
 - c. One bar of soap (HCF issued)
 - d. One roll toilet paper
 - e. One comb (HCF approved)
 - f. One stick deodorant (HCF issued or through inside store order only)
 - g. One 6" piece of dental floss (through inside store order only, trade-for-trade basis)

- h. Two towels and two washcloths
- i. One mattress
- j. One blanket
- k. One sheet
- l. One pillow
- m. One pillow case
- n. One pair slippers (HCF issued or through inside store only)
- o. One pair athletic shoes (through store order)
- p. Four issued T-shirts (white)
- q. Four undershorts (HCF issued or through store order only)
- r. Four pairs of socks (white athletic socks)
- s. One blue sweatshirt (through store order only, to be worn in the quadrant, no alteration)
- t. Two pairs of pants (HCF uniforms)
- u. Two pairs of shorts (athletic type, solid color, no pockets)
- v. Four sheets of writing paper (with or without lines, i.e., typing paper not to exceed 8-1/2" x 11", indigent only)
- w. One pencil (Pens for legal work must be requested from staff. When approved, pens shall be provided according to a reasonable schedule and commensurate with the inmate's legal needs.)

- x. Two letter size envelopes (HCF issued - indigent)
- y. One package of 75 letter size envelopes (through inside store order only)
- z. One tablet of writing paper (with or without lines, not to exceed 8-1/2" x 11" - issued through inside store order only. Indigent inmates with pending legal matters may request that the cost of the tablet be debited to their account. Cardboard will be removed.)
- aa. Manila envelopes may be purchased for immediate use by inmates with pending legal cases upon approval of the Unit Manager. Indigent inmates with pending legal cases may request that the cost of the envelopes be debited to their account.
- bb. Two legal books or transcripts and six citations. Provisions may be made for inmates with pending legal cases to have additional access to materials. Inmates may be denied access to their legal materials for up to 15 days.
- cc. One *Inmate Handbook*
- dd. Two library books (educational or recreational) after the inmate has served 15 days for the most recent finding of guilt by an adjustment committee.
- ee. One dictionary (must be requested from staff per schedule)
- ff. One Bible or religious book and two religious pamphlets or brochures approved by the Chaplain.

- gg. Stamps (limited to one book)
- hh. Four incoming correspondence/letters
- ii. One copy of "Inmate Guidelines for Phase I"

Authorized items for retention, as herein listed, shall not be altered or used other than the way they were intended to be used. All store ordered items shall be purchased on a trade-for-trade basis.

- 28. *Court clothes* will be permitted when necessary. They will consist of one (1) pair of dress slacks, one (1) dress shirt, one (1) pair of dress shoes, and one (1) pair of dress socks. They will be stored in the property room. Upon completion of the court cases, the inmate must arrange to have the clothing sent out of the facility within 30 days.
- 29. All HCF-issued property is the inmate's responsibility. Any damage, loss, etc., to issued property may result in a misconduct report being filed against the inmate assigned the property and may include his having to pay for the property.

PROHIBITED ITEMS

- 30. Anything not specifically authorized for possession, conveyance or introduction onto the HCF compound by the Facility Administrator shall be considered contraband. Inmates violating this section shall be subject to appropriate disciplinary sanctions which may include criminal charges.
- 31. Cigars, cigarettes, tobacco in any form or derivation, and/or smoking paraphernalia

shall not be permitted. Inmates shall not request cigarettes from staff.

COMMUNICATION

- 32. All requests will be in writing except for emergency situations.
- 33. Except in cases of medical emergency, all requests for medical attention must be in writing. No inmate shall possess any medication except as authorized by the medical unit with approval of Administration.
- 34. ACOs will accept requests from the inmates once daily in the morning.
- 35. Inmates shall communicate in the English language only; including telephone calls, visits and letters.

Exception: A written request must be submitted and approved by the Unit Manager for an inmate to speak a foreign language to a non-English speaking person which includes family members.
- 36. *Official visits* shall be permitted at any reasonable hour in accordance with applicable department and facility policies. Official visitors are encouraged to make prior appointments with the facility.

Personal Visits privileges shall be limited to two (2) one-hour non-contact visits per month as scheduled, except Saturdays, Sundays, and holidays. Phone number #1 shall be utilized for non-contract visits unless otherwise instructed by staff. Immediate family may visit during personal visiting periods. Immediate family shall be

defined as wife, mother, father, sister, brother, daughter, and son – whether natural or hanai. Non-immediate family members and friends may be permitted to visit subject to the following conditions:

Requests for such visits must be made in writing by the Phase I inmate to the United Manager no less than three (3) working days prior to the date of the proposed visit. The request must be approved by the Unit Manager before it may be scheduled.

Denial of such visits will be for cause. The reasons for denial will be furnished in writing to the inmate. Where confidential information is involved, a general summary will be provided to the inmate. Denial of visits under this provision will be for the safety, security, and good government of the facility only. The prospective visitor's criminal record, if any, will be considered. Non-immediate family and friend visitors will be permitted to visit only one Phase I inmate.

Off-Island Family Visits will be limited to off-island immediate family only. When visitors are unable to visit during regular visits as scheduled, they may request at least three days prior for a special visit. If approved by the Unit Manager, the visit will be for one-hour duration on a weekday during business hours. Airline tickets must be presented as verification of off-island status and the actual dates of stay on Oahu. Immediate family shall be defined as wife,

mother, father, sister, brother, daughter, and son whether natural or hanai.

CORRESPONDENCE

37. Incoming or outgoing mail to and from inmates will be inspected and read. Privileged mail as described by the *Inmate Handbook* should normally be inspected for contraband in the presence of the inmate. Outgoing privileged mail will be stamped by the ACO. Incoming personal mail may be withheld from the inmate for up to 15 days and outgoing personal mail may be restricted for up to 15 days in accordance with the provisions of the *Inmate Handbook*.
38. There is no restriction on *incoming personal letters* but inmates are allowed to keep only four (4) personal letters in their possession. Only personal letters may be received by inmates. All other items such as additional photographs, newspaper clippings, crossword puzzles, brochures, etc., will be placed into his property. Inmates may not enter contests through the mail.
39. Outgoing personal correspondence will not be limited except as above. The paper will be no longer than 8-1/2" x 11". All outgoing mail will be picked up from the cells daily at lights out (10:00 p.m.)

LAUNDRY

40. Laundry services are provided twice a week as scheduled.
41. Blankets will be cleaned and mattresses will be sanitized at least once a month as scheduled.

42. All clothing will be marked by code to assure proper return after laundry days.

TELEPHONE

43. Inmates shall be permitted one (1) official telephone call per day as scheduled and limited to five (5) minutes, except Saturdays, Sundays, and holidays. Telephone calls to and from the Ombudsman shall be permitted at any reasonable hour without delay. Personal telephone calls will be limited to one (1) scheduled personal telephone call per month, not to exceed ten (10) minutes.

STORE ORDERS

44. Inmates with available funds may purchase, upon approval of the Special Holding ACO IV, and through the inmate commissary, only items authorized for the Special Holding Unit. These items shall be purchased *only* as they are needed and on a trade-for-trade basis. No other items are allowed to be purchased.

EXERCISE PERIOD

45. Inmates shall be allowed to have five 60-minute indoor or outdoor exercise periods per week as scheduled unless compelling security or safety reasons dictate otherwise.

SHOWERS

46. Inmates will be given the opportunity to shower at least five (5) times per week for a time not to exceed ten (10) minutes, unless compelling security or safety reasons dictate otherwise. No toothbrush or comb will be brought out of the inmate's cell.

47. Razors will be provided to inmates for use in their cell for a time not to exceed five minutes, five times per week. Disposable razors shall be provided weekly by staff for each inmate's individualized use.

INCOMING/OUTGOING PERSONAL ITEMS

48. Court clothes may be brought in by family and friends on weekdays, except holidays, between 8:00 a.m. and 1:30 p.m. only, upon approval of the Unit Manager.
49. No books or magazines may be brought in via family and friends.

MONEY

50. *Incoming money* may be accepted through the mail in the form of money orders or cashier's checks only. Incoming money (money orders, cashier's checks, and cash) may be brought to the Medium Security Facility, Monday through Friday, 8:30 a.m. to 4:00 p.m. All money orders and cashier's checks should be made payable to the Halawa Correctional Facility with the name of the inmate shown on the check. *Personal checks will not be accepted at any time.*
51. *Outgoing money* - Inmates may make written requests to send their "spendable account" money out. The inmate is to state to whom the money is going, the amount, and the reason for the withdrawal. Upon approval by the Branch Administrator, a check will be given to the inmate's respective Case Manager for appropriate disposition.

GROOMING STANDARDS

52. Inmates are to encouraged shower and shave regularly.
53. Inmates are scheduled for haircuts regularly. Hair styles shall be in accordance with traditional standards of taste. The hair will be maintained in a neat and presentable fashion. Extreme hair styles such as mod styles or colors, unkept hair, and exaggerated sideburns are unacceptable. Hair that is excessively long in the front, side, or back of the head is not considered appropriate. Hair length shall not touch the shoulders. "Shaved head" haircuts are not allowed unless approved by the Branch Administrator or his designee.
54. Beards and mustaches may be allowed if they are short, clean, and groomed. Cleanliness, sanitation, security, and safety factors will be considered in determining appropriate hair, beard, and mustache styles.
55. Tattooing is prohibited.
56. Fingernails shall be maintained at a length that will not present a hazard to security and health.

These guidelines of the Segregation and Maximum Control Program (SMCP), Phase I, may be revised, modified, or amended without notice from time to time, upon approval of the Branch Administrator.

[Effective date of SMCP Phase I guidelines: Upon approval.]

APPROVED:

/s/ William Oku
William Oku,
 Branch Administrator
 11/28/88
Date

EXHIBIT "61"

DEPARTMENT OF CORRECTIONS
Institutions Division
Halawa Correctional Facility

INMATE GUIDELINES

Segregation and Maximum Control Program (SMCP)
Disciplinary Segregation

Inmates are subject to all State of Hawaii laws, Department of Corrections policies (handbook), and Halawa Correctional Facility (HCF) policies and procedures. Any deviation from these guidelines may be subject to a program hearing, disciplinary action and/or criminal charges.

The following are the guidelines for inmates programmed to the Disciplinary Segregation phase of HCF:

SELF-REPRESENTATION

1. No inmate shall be allowed to govern or order another inmate.
2. There will be no group representation. All inmates will be self-represented.

MOVEMENTS

3. All cell doors shall remain locked at all times unless authorized or permitted to be opened.
4. Only one inmate at a time shall be allowed out of his cell when authorized or permitted. While out of his cell, he shall go directly to and from his authorized destination and not loiter, visit with other inmates, or in any way delay his return to his cell.

5. Whenever an inmate is authorized to be moved out of Special Holding, that inmate shall be leg-ironed and waist-chained at all times during his absence.
6. All inmates in Special Holding shall be strip-searched upon leaving and returning to Special Holding.
7. Inmates must be properly dressed in HCF uniform and footwear must be worn at all times when leaving Special Holding, except for legitimate reasons. (Exceptions: Uniforms do not have to be worn at recreation and upon being escorted to court jury trials.)

SPECIAL HOLDING STANDARDS

8. No defacing of walls, windows, fixtures, and equipment.
9. There will be no obstruction to the see-through glass (window) on the cell door, windows, light fixtures, and vents.
10. Stringing of clothes lines shall not be permitted.
11. Inmates shall not use abusive or obscene language towards any staff member. Inmates shall not talk or make noise while staff members and visitors are in the inmate housing area.
12. All dayroom lights and all cell lights will be turned off at 10:00 p.m. All lights will be turned back on at 5:30 a.m.
13. Inmates are responsible for keeping their cells clean, orderly, and ready for inspection at all times.

14. Razors will be available for use as scheduled. Exceptions will be made for those inmates scheduled for official appearances (i.e., Court, parole hearings, etc.) Inmates in disciplinary segregation shall normally be permitted to shave at least five times per week.
15. Television privileges shall not be permitted.
16. No item shall be given to a staff member to be passed to another inmate.
17. Blankets, sheets, pillows, pillow cases, and mattresses shall be kept in the inmate's cell and remain on the elevated concrete slab.
18. Inmates shall not pass or receive any items under their cell door to/from another inmate under any circumstance.
19. Cardboard boxes, plastic containers, plastic bags, glass containers, cans, or any implement of storage shall not be permitted or stored in an inmate's cell. (Exception: Dentist/Unit Team approved containers for dentures.)
20. Jewelry and watches of any type shall not be permitted.
21. Radios, tape recorders, and all electronic entertaining devices shall not be permitted.
22. Instruments of music shall not be permitted.
23. No inmate shall have money in his possession. All money will be considered contraband and subject to confiscation. There will be no transferring of money from one HCF inmate account to another.

24. The toilet shall not be used as a disposal for discarded items. No item authorized for retention shall be flushed through the toilet except toilet paper.
25. Inmates will not make unreasonable noise or harass others. They will not use abusive or obscene language or crude gestures to others which might provoke a response.

MEALS

26. After each meal, all trays will be put in an orderly fashion outside of the cell. *No food will be stored in the cell.*

AUTHORIZED ITEMS FOR RETENTION

27. Except for the items listed below, nothing else is permitted for retention by the inmate in his cell. All excess personal items will be kept in the inmate's property storage area until arrangements by the inmate can be made for it to be sent out of the facility (via, i.e., family, friends, or mail.)
 - a. One tube toothpaste (HCF issued or through inside store order only)
 - b. One toothbrush (HCF issued or through inside store order only)
 - c. One bar of soap (HCF issued)
 - d. One roll toilet paper
 - e. One comb (HCF approved)
 - f. One stick deodorant (HCF issued or through inside store order only)
 - g. One 6" piece of dental floss (through inside store order only, trade-for-trade basis)

- h. Two towels and two washcloths
- i. One mattress
- j. One blanket
- k. One sheet
- l. One pillow
- m. One pillow case
- n. One pair slippers (HCF issued or through inside store only)
- o. One pair athletic shoes (through store order)
- p. Four issued T-shirts (white)
- q. Four undershorts (HCF issued or through store order only)
- r. Four pairs of socks (white athletic socks)
- s. One blue sweatshirt (through store order only, to be worn in the quadrant, no alteration)
- t. Two pairs of pants (HCF uniforms)
- u. Two pairs of shorts (athletic type, solid color, no pockets)
- v. Four sheets of writing paper (with or without lines, i.e., typing paper not to exceed 8-1/2" x 11", indigent only)
- w. One pencil (Pens for legal work must be requested from staff. When approved, pens shall be provided according to a reasonable schedule and commensurate with the inmate's legal needs.)

- x. Two letter size envelopes (HCF issued - indigent)
- y. One package of 75 letter size envelopes (through inside store order only)
- z. One tablet of writing paper (with or without lines, not to exceed 8-1/2" x 11" - issued through inside store order only. Indigent inmates with pending legal matters may request that the cost of the tablet be debited to their account. Cardboard will be removed.)
- aa. Manila envelopes may be purchased for immediate use by inmates with pending legal cases upon approval of the Unit Manager. Indigent inmates with pending legal cases may request that the cost of the envelopes be debited to their account.
- bb. Two legal books or transcripts and six citations. Provisions may be made for inmates with pending legal cases to have additional access to materials. Inmates may be denied access to their legal materials for up to 15 days.
- cc. One *Inmate Handbook*
- dd. Two library books (educational or recreational) after the inmate has served 15 days for the most recent finding of guilt by an adjustment committee.
- ee. One dictionary (must be requested from staff per schedule)
- ff. One Bible or religious book and two religious pamphlets or brochures approved by the Chaplain.

- gg. Stamps (limited to one book)
- hh. Four incoming correspondence/letters
- ii. One copy of "Inmate Guidelines for Disciplinary Segregation"

Authorized items for retention, as herein listed, shall not be altered or used other than the way they were intended to be used. All store ordered items shall be purchased on a trade-for-trade basis.

- 28. *Court clothes* will be permitted when necessary. They will consist of one (1) pair of dress slacks, one (1) dress shirt, one (1) pair of dress shoes, and one (1) pair of dress socks. They will be stored in the property room. Upon completion of the court cases, the inmate must arrange to have the clothing sent out of the facility within 30 days.
- 29. All HCF-issued property is the inmate's responsibility. Any damage, loss, etc., to issued property may result in a misconduct report being filed against the inmate assigned the property and may include his having to pay for the property.

PROHIBITED ITEMS

- 30. Anything not specifically authorized for possession, conveyance or introduction onto the HCF compound by the Facility Administrator shall be considered contraband. Inmates violating this section shall be subject to appropriate disciplinary sanctions which may include criminal charges.
- 31. Cigars, cigarettes, tobacco in any form or derivation, and/or smoking paraphernalia

shall not be permitted. Inmates shall not request cigarettes from staff.

COMMUNICATION

- 32. All requests will be in writing except for emergency situations.
- 33. Except in cases of medical emergency, all requests for medical attention must be in writing. No inmate shall possess any medication except as authorized by the medical unit with approval of Administration.
- 34. ACOs will accept requests from the inmates once daily in the morning.
- 35. Inmates shall communicate in the English language only; including telephone calls, visits and letters.

Exception: A written request must be submitted and approved by the Unit Manager for an inmate to speak a foreign language to a non-English speaking person which includes family members.

- 36. Visit privileges shall be limited to immediate family and to official visitors (i.e., legal counsel, Ombudsman, etc.) Immediate family shall be defined as mother, father, sister, brother, daughter, son, and wife; whether natural or hanai.

Official visits shall be permitted at any reasonable hour in accordance with applicable department and facility policies. Official visitors are encouraged to make prior appointments with the facility.

Family visits shall be scheduled after the inmate has served 15 days for his most

recent finding of guilt by an adjustment committee. Visits shall be limited to one half-hour non-contact visit per month as scheduled except Saturdays, Sundays and holidays. Phone number 1 will be utilized for non-contact visits unless otherwise instructed by staff. The inmate will submit a request to the Unit Manager specifying who will visit three days prior to the anticipated visit.

Off-Island Family Visits – when visitors are unable to visit during regular visits as scheduled, they may request ahead of time to have such visits rescheduled. If approved by the Unit Manager, the visit will be for one (1) half-hour duration on a weekday during business hours. Airline tickets must be presented as verification of off-island status and the actual dates of stay on Oahu.

CORRESPONDENCE

37. Incoming or outgoing mail to and from inmates will be inspected and read. Privileged mail as described by the *Inmate Handbook* should normally be inspected for contraband in the presence of the inmate. Outgoing privileged mail will be stamped by the ACO. Incoming personal mail may be withheld from the inmate for up to 15 days and outgoing personal mail may be restricted for up to 15 days in accordance with the provisions of the *Inmate Handbook*.
38. There is no restriction on *incoming personal letters* but inmates are allowed to keep only four (4) personal letters in their possession. Only personal letters may be received by

inmates. All other items such as additional photographs, newspaper clippings, crossword puzzles, brochures, etc., will be placed into his property. Inmates may not enter contests through the mail.

39. Outgoing personal correspondence will not be limited except as above. The paper will be no longer than 8-1/2" x 11". All outgoing mail will be picked up from the cells daily at lights out (10:00 p.m.)

LAUNDRY

40. Laundry services are provided twice a week as scheduled.
41. Blankets will be cleaned and mattresses will be sanitized at least once a month as scheduled.
42. All clothing will be marked by code to assure proper return after laundry days.

TELEPHONE

43. Inmates shall be permitted one (1) official telephone call per day as scheduled and limited to five (5) minutes, except Saturdays, Sundays, and holidays. Telephone calls to and from the Ombudsman shall be permitted at any reasonable hour without delay. Personal telephone calls may be permitted only in an emergency and upon approval by the ranking staff member in the Special Holding Unit.

STORE ORDERS

44. Inmates with available funds may purchase, upon approval of the Special Holding ACO IV, and through the inmate

commissary, only items authorized for the Special Holding Unit. These items shall be purchased *only* as they are needed and on a trade-for-trade basis. No other items are allowed to be purchased.

EXERCISE PERIOD

45. Inmates shall be allowed to have five 60-minute indoor or outdoor exercise periods per week as scheduled unless compelling security or safety reasons dictate otherwise.

SHOWERS

46. Inmates will be given the opportunity to shower at least five (5) times per week for a time not to exceed ten (10) minutes, unless compelling security or safety reasons dictate otherwise. No toothbrush or comb will be brought out of the inmate's cell.
47. Razors will be provided to inmates for use in their cell for a time not to exceed five minutes, five times per week. Disposable razors shall be provided weekly by staff for each inmate's individualized use.

INCOMING/OUTGOING PERSONAL ITEMS

48. Court clothes may be brought in by family and friends on weekdays, except holidays, between 8:00 a.m. and 1:30 p.m. only, upon approval of the Unit Manager.
49. No books or magazines may be brought in via family and friends.

MONEY

50. *Incoming money* may be accepted through the mail in the form of money orders or

cashier's checks only. Incoming money (money orders, cashier's checks, and cash) may be brought to the Medium Security Facility, Monday through Friday, 8:30 a.m. to 4:00 p.m. All money orders and cashier's checks should be made payable to the Halawa Correctional Facility with the name of the inmate shown on the check. *Personal checks will not be accepted at any time.*

51. *Outgoing money* - Inmates may make written requests to send their "spendable account" money out. The inmate is to state to whom the money is going, the amount, and the reason for the withdrawal. Upon approval by the Branch Administrator, a check will be given to the inmate's respective Case Manager for appropriate disposition.

GROOMING STANDARDS

52. Inmates are encouraged to shower and shave regularly.
53. Inmates are scheduled for haircuts regularly. Hair styles shall be in accordance with traditional standards of taste. The hair will be maintained in a neat and presentable fashion. Extreme hair styles such as mod styles or colors, unkept hair, and exaggerated sideburns are unacceptable. Hair that is excessively long in the front, side, or back of the head is not considered appropriate. Hair length shall not touch the shoulders. "Shaved head" haircuts are not allowed unless approved by the Branch Administrator or his designee.

54. Beards and mustaches may be allowed if they are short, clean, and groomed. Cleanliness, sanitation, security, and safety factors will be considered in determining appropriate hair, beard, and mustache styles.
55. Tattooing is prohibited.
56. Fingernails shall be maintained at a length that will not present a hazard to security and health.

These guidelines of the Segregation and Maximum Control Program (SMCP), Disciplinary Segregation phase, may be revised, modified, or amended without notice from time to time, upon approval of the Branch Administrator.

[Effective date of SMCP Disciplinary Segregation guidelines: Upon approval.]

APPROVED:

/s/ William Oku
William Oku,
 Branch Administrator
11/28/88
 Date

IN THE UNITED STATES DISTRICT COURT FOR THE
 DISTRICT OF HAWAII

DeMONT R.D. CONNER,
 PLAINTIFF,

CIVIL No. 88-0169
ACK

vs.

AMENDED
 COMPLAINT

THEODORE SAKAI, WILLIAM
 OKU, CINDA SANDIN, STATE OF
 HAWAII, HAROLD FALK,
 LAURENCE SHOHET, LEONARD
 GONSALVES, KIM THORBURN
 M.D., FRANCIS SEQUEIRA,
 WILLIAM SUMMERS, ROBERT
 JOHNSON, GORDON FURTADO,
 ABRAHAM LOTA, EDWARD
 MARSHAL, WILLIAM PAAGA,
 BRIAN LEE,

IN THEIR INDIVIDUAL AND
 OFFICIAL CAPACITIES,
 DEFENDANTS.

(Filed Sept. 8, 1989)

AMENDED COMPLAINT
CIVIL RIGHTS COMPLAINT WITH A JURY DEMAND

This is a CIVIL RIGHTS ACTION filed under 42 U.S.C. SECTIONS 1983, 1985(3), and 1986 by DeMONT R.D. CONNER, A STATE PRISONER, alleging violations of his CONSTITUTIONAL RIGHTS and seeking DECLARATORY JUDGMENT, INJUNCTIVE RELIEF and MONEY DAMAGES. Plaintiff Requests a trial by jury.

JURISDICTION

1. This is a CIVIL RIGHTS ACTION under 42 U.S.C.

SECTIONS 1983, 1985(3), 1986. This Court has Jurisdiction under 28 U.S.C. SECTION 1343(3). Plaintiff also invokes the PENDENT JURISDICTION of this Court. Defendant STATE has waived IMMUNITY to be sued Pursuant to SECTION 662-2 of the Hawaii Revised Statutes ("H.R.S.") and is to be treated like any Private individual.

PARTIES

2. Plaintiff DeMONT R.D. CONNER, is a State prisoner incarcerated in the Halawa High Security Facility ("H.H.S.F.") a Complex within the Halawa Correctional Facility ("H.C.F.).

3. Defendant THEODORE SAKAI ("SAKAI"), is a Resident of the State of Hawaii. He is, and was at all times herein relevant, the ACTING ADMINISTRATOR of the Department of Institutions, which is within the Department of Corrections.

4. Defendant WILLIAM OKU ("OKU"), is a Resident of the State of Hawaii. He is, and was at all times herein relevant the Administrator of H.C.F.

5. Defendant CINDA SANDIN ("SANDIN"), is a Resident of the State of Hawaii. She is, and was at all times herein relevant the Unit Team Manager of H.H.S.F.

6. Defendant HAROLD FALK ("FALK"), is a Resident of the State of Hawaii. He is, and was at all times herein relevant the Director of Corrections. AND is a

LEGALLY AUTHORIZED Representative of Defendant State of Hawaii ("STATE").

7. Defendant LAURENCE SHOHEH ("SHOHEH"), is a Resident of the State of Hawaii. He is, and was at all times herein relevant, the Corrections Supervisor II, which is the highest ranking position at H.C.F.

8. Defendant LEONARD GONSALVES ("GONSALVES"), is a Resident of the State of Hawaii. He is, and was at all times herein relevant, the Chief of Security of H.C.F.

9. Defendant KIM THORBURN ("THORBURN"), is a Resident of the State of Hawaii. She is, and was at all times herein relevant, the Health Care Director of Corrections.

10. Defendant FRANCIS SEQUEIRA ("SEQUEIRA"), is a Resident of the State of Hawaii. He is and was at all times herein relevant a Unit Manager of H.C.F.

11. Defendant WILLIAM SUMMERS ("SUMMERS"), is a Resident of the State of Hawaii. He was at the times herein relevant, a Sergeant [sic] of H.H.S.F.

12. Defendant ROBERT JOHNSON ("JOHNSON"), is a Resident of the State of Hawaii. He is, and was at all times herein relevant, a Serjeant [sic] of H.H.S.F.

13. Defendant GORDON FURTADO ("FURTADO"), is a Resident of the State of Hawaii. He was at the times herein relevant, an Adult Correctional Officer ("A.C.O.") IV of H.H.S.F.

14. Defendant ABRAHAM LOTA ("LOTA"), is a Resident of the State of Hawaii. He is, and was at all times herein relevant, a Temporary Acting Sergeant of H.H.S.F.

15. Defendant EDWARD MARSHAL ("MARSHAL"), is a Resident of the State of Hawaii. He is, and was at all times herein relevant, an A.C.O. III of H.H.S.F.

16. Defendant WILLIAM PAAGA ("PAAGA"), is a Resident of the State of Hawaii. He is and was at all times herein relevant, an A.C.O. II of H.H.S.F.

17. Defendant BRIAN LEE ("LEE"), is a Resident of the State of Hawaii. He is and was at all times herein relevant, an A.C.O. III of H.H.S.F.

STATEMENT OF FACTS

18. PLAINTIFF SEEKS DECLARATORY AND INJUNCTIVE RELIEF FOR DEPRIVATION UNDER COLOR OF STATE LAW, FOR THE RIGHTS, PRIVILEGES, AND IMMUNITIES SECURED BY THE UNITED STATES CONSTITUTION, AND IN PARTICULAR, THOSE SECURED BY THE FIRST, FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS THEREOF.

19. PLAINTIFF SPECIFICALLY SEEK [sic] RELIEF FROM CONDITIONS WHICH FALL BELOW THE STANDARD OF HUMAN DECENCY, DENY BASIC HUMAN NEEDS AND INFLECTS NEEDLESS SUFFERING ON

PRISONERS, PLAINTIFF FURTHER CONTENDS THAT HE IS FORCED TO LIVE IN AN ENVIRONMENT WHERE THE ILL-EFFECTS OF PARTICULAR CONDITIONS WHICH THREATEN HIS PHYSICAL AND MENTAL WELL-BEING AND RESULTS UNNECESSARILY ON HIS PHYSICAL AND MENTAL DETERIORATION.

20. DEFENDANTS HAVE IMPOSED UPON PLAINTIFF A REPRESSIVE, ARBITRARY, AND IRRATIONAL BEHAVIOR MODIFICATION PROGRAM WHICH IS SO TOTALLY DEVOID OF PENOLOGICAL JUSTIFICATION THAT IT IS PUNITIVE.

21. DEFENDANTS INSTITUTED A NEW BEHAVIOR MODIFICATION SYSTEM APPROXIMATELY MARCH OF 1981, IT WAS IMPOSED ON ALL MAXIMUM CLASSIFICATION INMATE [sic], THE PROGRAM WAS DESIGNED BY PERSONS WITH NO SPECIALIZED TRAINING IN THIS AREA, AND THE SAID PROGRAM WAS NOT TESTED NOR VALIDATED.

22. DEFENDANTS BEHAVIOR MODIFICATION PROGRAM DENIES PLAINTIFF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW BY NOT POSTING WRITTEN GUIDELINES FOR PLAINTIFF TO KNOW EXPECTED BEHAVIOR TO BE RELEASED FROM PHASE ONE, AND MODULES "A", "B", AND "C".

23. DEFENDANTS BEHAVIOR MODIFICATION PROGRAM DENIES PLAINTIFF AND ALL INMATES PERIODIC REVIEWS, IN MODULES "A", "B", AND "C" TO MAKE DETERMINATIONS CONCERNING HIS BEHAVIOR AND FOR ADVANCEMENT THROUGH DEFENDANTS BEHAVIOR MODIFICATION PROGRAM OR PHASING SYSTEM.

24. DEFENDANTS BEHAVIOR MODIFICATION PROGRAMS' PHASE ONE DENIES PLAINTIFF A NOTICE, HEARINGS, OR ANY INPUT INTO THE 30 DAY REVIEWS, AND SUCH REVIEWS ARE CONDUCTED BY PERSONS WHO DO NOT HAVE ANY CONTACT WITH PLAINTIFF, AND RELIES SOLELY ON A SUBJECTIVE CRITERIA.

25. DEFENDANTS PHASE ONE SUBJECTS PLAINTIFF TO AN INDEFINITE PERIOD OF CONFINEMENT AND SERVES NO JUSTIFIABLE PENOLOGICAL PURPOSE AND IS A MERE RELABELING OF DISCIPLINARY SEGREGATION AND IS PUNITIVE.

26. DEFENDANTS PHASE ONE AND DISCIPLINARY SEGREGATION SUBJECTS PLAINTIFF TO INADEQUATE EXERCISE AND RECREATION OF BOTH OUTDOOR AND INDOOR, WHILE PLAINTIFF IS CONFINED FOR AT LEAST 22 HOURS A DAY.

27. DEFENDANTS DENY PLAINTIFF WHILE IN PHASE ONE AND DISCIPLINARY SEGREGATION TO USE THE INDOOR GYMNASIUM WHEN THEY FOR SOME REASON CANCEL OUTDOOR RECREATION AND INSTEAD SUBJECTS PLAINTIFF TO CONDUCT HIS RECREATION IN HIS CELL WHICH IS THE SAME PLACE HE EATS, SLEEPS, AND LIVES FOR 22 HOURS A DAY, AND WHICH ALSO WAS NOT CONSTRUCTED FOR RECREATIONAL PURPOSES AND ALSO WHICH DOES NOT PROVIDE ADEQUATE SPACE TO HAVE RECREATION.

28. DEFENDANTS PHASE ONE AND DISCIPLINARY SEGREGATION IS IN THE SPECIAL HOLDING UNIT WHICH USES STRIP CELLS FOR PUNISHMENTS

WHICH ASPECTS SUBJECTS PLAINTIFF TO CRUEL AND UNUSUAL PUNISHMENT BY HAVING A MATTRESS [sic] ON MERE 6 INCH SLAB ABOVE THE GROUND, INADEQUATE LIGHTING, NO DESKS AND TABLES TO EAT AND WRITE ON, AND OF WHICH SUBJECTS PLAINTIFF TO HAVE HIS FOOD SERVED FROM UNDER THE CELL DOOR ON THE FLOOR, WHICH IS DEHUMANIZING AND HAS A PSYCHOLOGICAL AFFECT UPON PLAINTIFF.

29. DEFENDANTS DENY PLAINTIFF TO RECEIVE PICTURES, BROCHURES, NEWSPAPER CLIPPINGS, RELIGIOUS MATERIALS, AND CROSSWORD PUZZLES [sic] THROUGH THE MAIL WHILE IN PHASE ONE AND DISCIPLINARY, AND INSTEAD ONLY PERMIT HIM TO HAVE LETTERS, WITH ONLY THE ENGLISH LANGUAGE WRITTEN ON IT.

30. DEFENDANTS DISCRIMINATE AGAINST PLAINTIFF AND ALL INMATES ON PHASE ONE AND DISCIPLINARY SEGREGATION FOR ACCESS TO ADEQUATE MEDICAL AND DENTAL CARE.

31. DEFENDANTS DENY PLAINTIFF RELIGIOUS COUNSELING WHILE IN PHASE ONE AND DISCIPLINARY SEGREGATION.

32. DEFENDANTS DENY PLAINTIFF PSYCHOLOGICAL AND PSYCHIATRIC EXAMINATIONS WHILE HE IS HOUSED IN PHASE ONE AND DISCIPLINARY SEGREGATION.

33. DEFENDANTS SUBJECTED PLAINTIFF TO 17 HOURS A DAY OF PUNITIVE CONFINEMENT FOR NO JUSTIFIABLE PENOLOGICAL PURPOSE WHILE

HOUSED IN MODULE "A", WITHOUT ANY CHARGES OF MISCONDUCT, NOTICE, HEARINGS, OPPORTUNITY TO RESPOND, OR PRESENT WITNESSES, OR EVIDENCE ON HIS BEHALF.

34. DEFENDANTS SUBJECT PLAINTIFF TO DOUBLE CELLING, IN MODULE "A" WHICH ONE PERSON MUST SLEEP ON THE FLOOR BECAUSE THE CELL HAS ONLY ONE BUNK, AND MODULE "A"'S CELLS DO NOT PROVIDE ADEQUATE LIGHTING.

35. DEFENDANTS DENY PLAINTIFF THE OPPORTUNITY TO PARTICIPATE IN EDUCATIONAL, VOCATIONAL, AND COUNSELING PROGRAMS THAT ARE MANDATED BY STATE LAW, WHILE, HOUSED IN MODULE "A".

36. DEFENDANTS SUBJECT PLAINTIFF TO MASS PUNISHMENT BY CONFISCATING THE WEIGHTS IN MODULE "A" DUE TO ONE INMATES' ATTEMPT TO USE IT TO ESCAPE, EVEN THOUGH DEFENDANTS REMEDIED THE SITUATION BY COVERING ALL RECREATION YARDS WITHIN THE FACILITY; AND DEFENDANTS ALSO USE THE WEIGHTS FOR PUNITIVE PURPOSES IN ATTEMPTING TO HAVE PLAINTIFF CONFORM HIS BEHAVIOR BEFORE HE MAY HAVE ACCESS TO WEIGHTS WHICH ARE LOCATED IN MODULES "B" AND "C".

37. DEFENDANTS ARBITRARILY DENY PLAINTIFF TO WHAT LITTLE RIGHTS HE STILL POSES [sic] IN PRIVACY BY SUBJECTING HIM TO A "BLANKET POLICY" STRIP-SEARCH PROCEDURE, EVERY TIME HE LEAVES HIS HOUSING AREA AND RETURNS TO HIS HOUSING AREA, AND WHEN HE IS BOUND BY

LEG-IRONS AND HAND-CUFFS OR WAIST CHAINS, AND WITH AT LEAST TWO A.C.O.'S WHERE EVER HE GOES, AND PHYSICAL CONTACT WITH OTHER INMATES IS VIRTUALLY NON-EXISTENT; AND IF HE IS MEETING WITH ANY BODY FROM THE OUTSIDE (OFFICIAL VISITS) THE INTERVIEW ROOMS THAT ARE USED TO HOLD THE VISIT ARE THOROUGHLY SEARCHED, AND ALL VISITORS ARE PAT-FRISKED; AND IF HE IS HAVING A PERSONAL VISIT, THESE VISITS ARE NON-CONTACT WITH A BULLET RESISTENT [sic] INCH THICK GLASS AND CONCRETE AND STAINLESS STEEL SEALING OFF PLAINTIFF FROM HIS VISITOR, AND THE ONLY CONTACT THAT MAY BE HAD IS THROUGH A TELEPHONE, AND A.C.O.'S MONITOR THESE VISITS THROUGH A TWO-WAY MIRROR, AND THE A.C.O.'S WHO ESCORT HIM THERE DO A THOROUGH SEARCH OF THE VISITING AREA BEFORE PERMITTING PLAINTIFF TO ENTER DEFENDANTS STRIP-SEARCH POLICY IS AN EXAGGERATION OF SECURITY, AND IMPERMISSABLY INTRUDES ON PLAINTIFF PRIVACY AND CAUSES PLAINTIFF TO SUFFER MENTAL AND EMOTIONAL ANGUISH THROUGH DEHUMANIZATION OF HIS PERSON.

38. DEFENDANTS DENY ALL INMATES AND PLAINTIFF ADEQUATE EXERCISE AND RECREATION IN MODULES "A"; "B"; AND "C" ALSO WITH ONLY 60 MINUTES OF RECREATION TIME OUTDOORS ONLY FIVE DAYS A WEEK, WITH NO ALLOWANCE FOR MAKE UP TIME SHOULD OUTDOOR RECREATION IS [sic] CANCELLED FOR ANY VARIETY OF REASONS,

AND THE USE OF THE INDOOR GYMNASIUM IS VIRTUALLY NON-EXISTENT.

39. DEFENDANTS DENY PLAINTIFF HIS RIGHT TO FREEDOM OF EXPRESSION AND ASSOCIATION BY IMPOSING A "PUBLISHER ONLY RULE", REGARDING BOOKS AND MAGAZINES, AND OF WHICH DENIES HARD BOUND COVERED BOOKS; ALSO IN ORDER FOR PLAINTIFF TO BE ABLE TO RECEIVE SUCH BOOKS HE HAS TO DONATE IT TO THE STATE LIBRARY, WHEREBY HE CANNOT KEEP HIS PURCHASED BOOKS. DEFENDANTS ALSO DENY PLAINTIFF TO SUBSCRIBE TO ANY BOOK AND MAGAZINE COMPANY.

40. PLAINTIFF WHILE CONFINED IN H.H.S.F. HAS BEEN SUBJECTED TO CONSPIRACIES TO RETALIATE, HARASS, AND RETRIBUTION BY PARTICULAR DEFENDANTS, FOR PLAINTIFF WORK AS A JAIL-HOUSE LAWYER; AND THESE ARBITRARY AND CAPRICIOUS ACTS BY PARTICULAR DEFENDANTS DO NOT LEAD TO ANY ADVANCEMENT TO LEGITIMATE GOALS OF H.H.S.F. NOR ARE THESE ACTS TAILORED NARROWLY ENOUGH TO ACHIEVE SUCH GOALS.

41. THAT ON JUNE 23, 1987 PLAINTIFF BECAME AWARE THAT HE TOO, LIKE OTHER JAIL-HOUSE LAWYERS IN H.H.S.F. WAS A TARGET FOR RETALIATION BY PRISON AUTHORITIES WHEN, VIA GRIEVANCE RESPONSE PLAINTIFF WAS TOLD BY THE THEN ACTING UNIT MANAGER FRANCIS SEQUEIRA (DEFENDANT) THAT "YOUR BEHAVIOR PREDICATES ADVANCEMENT TO MODULE "B", WHEN INDEED

PLAINTIFF HAS HELD A VIRTUAL POSITIVE BEHAVIOR SINCE HIS ARRIVAL TO H.H.S.F. IN SEPTEMBER 3, 1985, AND THAT THERE IS STRONG EVIDENCE THAT PLAINTIFF CAN SHOW THAT THIS RESPONSE AND DECISION TO HOLD PLAINTIFF BACK FROM ADVANCING IN DEFENDANTS BEHAVIOR MODIFICATION PROGRAM, WAS DUE TO HIS INVOLVEMENT IN JAIL-HOUSE LAWYER ACTIVITIES.

42. THAT DEFENDANTS SEQUEIRA AND SUMMERS CONSPIRED TO RETALIATE AGAINST ME FOR FILING A COMPLAINT AGAINST THEM FOR RETALIATING AGAINST ME AND HARASSING ME BY FILING A MALICIOUSLY MOTIVATED MISCONDUCT REPORT AGAINST PLAINTIFF FOR REFUSING TO OBEY DEFENDANT SUMMERS' ORDER WHICH DEFENDANT SEQUEIRA CORROBORATED, BUT PLAINTIFF PROVED THAT DEFENDANTS WERE LYING IN THEIR REPORT, AND THE COMMITTEE FOUND PLAINTIFF NOT GUILTY DUE TO DEFENDANT SUMMERS "CONFLICTING TESTIMONY". THIS MISCONDUCT WAS FILED AGAINST PLAINTIFF TO HAVE HIM PUNISHED IN PUNITIVE ISOLATION.

43. THAT DEFENDANTS SUMMERS AND FURTADO AND SANDIN ENTERED INTO A CONSPIRACY TO DEPRIVE PLAINTIFF OF HIS CONSTITUTIONALLY PROTECTED RIGHTS BY MALICIOUSLY CHARGING PLAINTIFF WITH MISCONDUCT, THEN HOLDING A "MOCK ADJUSTMENT HEARING" WHERE DEFENDANT SANDIN DENIED PLAINTIFF OF HIS FUNDAMENTAL RIGHTS TO DUE PROCESS WHEN SHE REFUSED PLAINTIFF HIS RIGHT TO QUESTION THE CHARGING A.C.O. WHO WROTE ME UP, BEING

DEFENDANT FURTADO, TO REVIEW THE SUBMITTED REPORTS CONCERNING THE CHARGES, AND TO CALL WITNESSES, OR TO EVEN POSTPONE THE HEARING SO I MAY EXERCISE MY RIGHT TO A FAIR HEARING. DEFENDANT SANDIN FURTHERMORE HARMED PLAINTIFF BY DOCTORING HIS TESTIMONY TO USE IT AGAINST HIM.

44. THAT DEFENDANT SANDIN FURTHERED HER PART IN THE CONSPIRACY TO DEPRIVE PLAINTIFF OF HIS RIGHTS BY HAVING THE SPECIAL HOLDING STAFF CONFISCATE PLAINTIFF'S LEGAL PROPERTY AS HE ENTERED SPECIAL HOLDING (HEREINAFTER "S.H.U.I.") AND WITHHOLDING HIS LEGAL PROPERTY FOR NEARLY TWO MONTHS.

45. THAT DEFENDANTS SUMMERS, FURTADO, AND SANDIN'S CONSPIRACY CAME AFTER PLAINTIFF CALLED THE FEDERAL BUREAU OF INVESTIGATIONS CHARGING DEFENDANT SUMMERS WITH DISCRIMINATION FOR HIS ACTIVITIES AS A JAILHOUSE LAWYER.

46. THAT DEFENDANT MARSHAL TOOK PART IN THE CONSPIRACY WHEN HE BEGAN TO CONSTANTLY HARASS AND HUMILIATE PLAINTIFF BY CHARGING PLAINTIFF WITH FALSE CHARGES OF MISCONDUCT, CALLING PLAINTIFF A RAPIST, REFUSING PLAINTIFF MEDICATION, AND REFUSING PLAINTIFF USE OF CLEANING EQUIPMENT, AND DELIBERATELY PROVOKING PLAINTIFF.

47. DEFENDANT MARSHAL'S ACTIONS IN THE ABOVE DESCRIBED EPISODES TOOK PLACE DURING SEPTEMBER 1987 TO DECEMBER 1987. THEN ON TWO

SEPARATE OCCASIONS IN JUNE 1988, DEFENDANT MARSHAL CONFISCATED A TOTAL OF SEVEN (7) OF PLAINTIFF'S PERSONAL CASE LAW CITATIONS FROM HIS CELL.

48. DEFENDANT MARSHAL FURTHERED HIS MALICIOUS ACTS AGAINST PLAINTIFF BY PROVOKING PLAINTIFF INTO MISCONDUCT WHEN HE DENIED PLAINTIFF TOILET PAPER WHICH CAUSED PLAINTIFF SUCH MENTAL ANGUISH THAT HE STARTED TO CUSS DEFENDANT MARSHAL, THEN DEFENDANT MARSHAL SINGLED PLAINTIFF OUT BY HAVING PLAINTIFF TO GO THROUGH TWO STRIP-SEARCHES AND ONE CELL SEARCH TO SEE IF PLAINTIFF DIDN'T HAVE TOILET PAPER IN HIS CELL. THIS INCIDENT TOOK PLACE ON OCTOBER 7, 1988, AND PLAINTIFF WAS ALSO CHARGED WITH FIRST DEGREE TERRORISTIC THREATENING OF DEFENDANT MARSHAL WHICH DEFENDANT PAAGA DENIED KNOWING ANYTHING OF THIS INCIDENT WHEN HE WAS IN FACT INVOLVED.

49. DEFENDANT LOTA ENGAGED IN HIS OWN RETALIATION AGAINST PLAINTIFF WHEN HE REFUSED TO GIVE PLAINTIFF HIS CLOTHES DURING A STRIP-SEARCH ROUTINE, FOR AN INDEFINITE PERIOD OF TIME DUE TO PLAINTIFF'S REFUSAL TO REMOVE HIS FALSE-TOOTH, WHICH DEFENDANT LOTA WAS TOLD TO DISCONTINUE THIS PRACTICE.

50. DEFENDANT LEE ALSO ENGAGED IN RETALIATION AGAINST PLAINTIFF WHEN HE TOO ATTEMPTED AND SUCCEEDED IN HAVING PLAINTIFF REMOVE HIS FALSE-TOOTH WHILE USING THE

LAW LIBRARY AS A TOOL TO FORCE PLAINTIFF TO COMPLY, WHEN PLAINTIFF WAS BEING STRIP-SEARCHED BEFORE GOING TO THE LAW LIBRARY.

51. DEFENDANT LEE CONTINUED HIS MALICIOUS ACTS AGAINST PLAINTIFF ALONG WITH DEFENDANT PAAGA BY CONDUCTING SEARCHES OF PLAINTIFF'S CELL AND LEAVING IT IN A SHAMBLES [sic], AND TELLING PLAINTIFF TO CLEAN IT UP. THIS TOOK PLACE ON TWO SEPARATE OCCASIONS, ONE OF WHICH DEFENDANT PAAGA DELIBERATELY KICKED PLAINTIFF'S LEGAL MATERIALS INTO PLAINTIFF'S FACE. THESE DEFENDANTS ALSO CONFISCATED PLAINTIFF [sic] LEGAL PAPERS

52. DEFENDANT GONSALVES SUBJECTED PLAINTIFF TO DEFAMATIONS OF HIS CHARACTER WHEN DEFENDANT GONSALVES REPEATEDLY TOLD PLAINTIFF THAT HE HAS A REPUTATION FOR BEING A "CHRONIC COMPLAINER", WHEN PLAINTIFF REVEALED TO DEFENDANT GONSALVES OF HIS SUBORDINATES ARBITRARY CONDUCTS AGAINST PLAINTIFF, AND WHEREBY TOTALLY IGNORING PLAINTIFF'S GRIEVANCES.

53. DEFENDANTS ALSO DENY PLAINTIFF DUE PROCESS OF LAW BY THEIR ARBITRARY USE OF #106 MINOR MISCONDUCT FORMS AS MANDATED BY STATE LAW, AND DEFENDANTS IN FACT CONDONE THE ARBITRARY USE OF #106 MINOR MISCONDUCTS, WHICH PLAINTIFF IS NOT GIVEN A CHANCE TO DEFEND HIMSELF, OR OFFER MITIGATING EVIDENCE, AND PLAINTIFF IS TOLD TO SIGN THE #106

MINOR MISCONDUCT FORMS BY THE SAME OFFICER THAT WROTE HIM UP.

54. DEFENDANTS DENY PLAINTIFF, ARBITRARILY, HIS RIGHT TO FREEDOM OF SPEECH BY PROMULGATION A RULE THAT ALL INMATES WILL SPEAK IN THE ENGLISH LANGUAGE ONLY. THIS RULE ALSO INTRUDES ON HIS RELIGIOUS BELIEF'S BECAUSE AS A MUSLIM HE MUST SAY HIS PRAYERS IN ARABIC, AND PLAINTIFF WHILE LEARNING TO SPEAK ARABIC PRAYERS PROPERLY WITH ANOTHER FELLOW MUSLIM, HE WAS ORDERED BY DEFENDANT LEE TO STOP, BUT WHEN PLAINTIFF REFUSED, HE WAS WRITTEN UP FOR DISOBEYING AN ORDER. DEFENDANTS "ENGLISH SPEEING [sic] ONLY" RULE IMPERMISSIBLY INTERFERES WITH PLAINTIFF [sic] CONSTITUTIONALLY PROTECTED RIGHTS.

OFFICIAL RESPONSIBILITIES

DEFENDANT FALK WHO IS THE DIRECTOR OF THE DEPARTMENT OF CORRECTIONS, HAS THE RESPONSIBILITY FOR THE PROMULGATION AND ENFORCEMENT OF RULES, REGULATIONS, POLICIES, AND PRACTICES; AND HE IS FULLY AWARE OF THE BEHAVIOR MODIFICATION PROGRAM AT H.H.S.F. AND HAS ALLOWED IT TO CONTINUE TO BE ENFORCED UPON INMATES.

DEFENDANT THEODORE SAKAI, WHO HAS BEEN DEFENDANT OKU'S SUPERIOR FOR MANY YEARS, HAS REFUSED TO REMEDY THE CONSTITUTIONALLY DEFICIENT ASPECTS OF THE BEHAVIOR MODIFICATION SYSTEM AT H.H.S.F. DEFENDANT SAKAI, IS

ALSO RESPONSIBLE FOR REFUSING TO REMEDY DEFENDANT SUMMERS AND SANDIN'S ARBITRARY ACTS AGAINST PLAINTIFF, THAT HE KNEW OR SHOULD HAVE KNOWN [sic] WERE AGAINST POLICY AND VIOLATIVE OF PLAINTIFFS RIGHTS.

DEFENDANT OKU AND SHOHET ARE RESPONSIBLE FOR PROMULGATING THE BEHAVIOR MODIFICATION PROGRAM AT H.H.S.F. AND ENFORCING IT UPON INMATES, AND THEY KNEW OR SHOULD HAVE KNOWN WAS VIOLATIVE OF PLAINTIFF'S FEDERALLY [sic] AND STATE RIGHTS.

DEFENDANT THORBURN IS RESPONSIBLE FOR ALLOWING H.H.S.F. TO OPERATE UNDER INADEQUATE MEDICAL AND DENTAL CONDITIONS AND ALLOWING PLAINTIFF AND ALL INMATES TO BE DISCRIMINATED WITH REGARDS TO TREATMENT WHILE IN PUNITIVE ISOLATION.

CLAIMS

THE ACTIONS OF THE DEFENDANTS STATED IN PARAGRAPHS 18 TO 54, DENIED PLAINTIFF HIS RIGHTS SECURED UNDER THE FIRST, FOURTH, FIFTH, SIXTH, EIGHTH, FOURTEENTH AMENDMENTS OF THE UNITED STATE CONSTITUTION. PLAINTIFF'S RIGHTS WERE VIOLATED WHEN;

(A) DEFENDANTS IMPERMISSIBLY INTRUDED UPON PLAINTIFF'S MENTAL FACULTY BY SUBJECTING PLAINTIFF TO A BEHAVIOR MODIFICATION PROGRAM THAT ACCORDING TO STATE LAW IS A TYPE THEY

ARE NOT QUALIFIED AND LICENSED TO ENGAGE IN;

(B) DEFENDANTS FORCED UPON PLAINTIFF THEIR BEHAVIOR MODIFICATION PROGRAM THAT WAS NOT APPROVED BY THE GOVERNOR OF THE STATE OF HAWAII AS REQUIRED BY STATE LAW IN ORDER TO HAVE THE "FORCE AND EFFECT OF LAW" IN ORDER TO BE VALID;

(C) DEFENDANTS SUBJECTED PLAINTIFF TO PUNITIVE ISOLATION IN THEIR BEHAVIOR MODIFICATION PROGRAM WITHOUT DUE PROCESS OF LAW; AND TO PUNITIVE CONFINEMENT THAT IS CONTRARY TO STATE LAW AND STATUTES;

(D) DEFENDANTS DENIED PLAINTIFF ADEQUATE EXERCISE AND RECREATION WHICH IS MANDATED BY STATE LAW, AND REQUIRED BY THE EIGHTH AMENDMENT;

(E) DEFENDANTS IMPERMISSIBLY INTRUDED ON PLAINTIFFS PRIVACY BY SUBJECTING HIM TO AN ARBITRARY STRIP-SEARCH POLICY;

(F) DEFENDANTS ARBITRARILY USED THE #106 MINOR MISCONDUCT FORMS AGAINST PLAINTIFF WITHOUT DUE PROCESS OF LAW;

(G) DEFENDANTS ENGAGED IN A "DELIBERATE INDIFFERENCE" POLICY TO PLAINTIFF AND ALL INMATES MEDICAL NEEDS WHILE CONFINED IN SPECIAL HOLDING;

(H) DEFENDANTS DENIED AND/OR INTERFERED WITH PLAINTIFF'S RIGHT TO

FREEDOM OF RELIGION AND TO EXPRESS THAT BELIEF;

(I) DEFENDANTS DENIED PLAINTIFF TO RECEIVE MAILED ARTICLES BY PROMULGATING A "BLANKET POLICY" DENYING INMATES TO RECEIVE ITEMS THROUGH THE MAIL THAT DOES [sic] NOT BEAR NO REASONABLE RELATIONSHIP TO SECURITY NEEDS;

(J) DEFENDANTS DENIED PLAINTIFF TO FREEDOM OF ASSOCIATION AND EXPRESSION BY CREATING A "PUBLISHER ONLY" RULE, AND BY CREATING A RULE THAT IN ORDER FOR INMATES TO RECEIVE SUCH ITEMS, THEY MUST FIRST DONATE IT TO THE STATE;

(K) DEFENDANTS SUBJECTED PLAINTIFF TO EXCESSIVELY LONG PERIODS OF PUNITIVE CONFINEMENT IN DEHUMANIZING STRIP-CELLS;

(L) DEFENDANTS SUBJECTED PLAINTIFF TO DOUBLE CELLING AND WHICH CELLS ARE ALSO INADEQUATELY LIGHTED AND OF WHICH PLAINTIFF WAS CONFINED FOR 17 HOURS A DAY IN MODULE "A";

(M) WHEN DEFENDANTS RETALIATED, CONSPIRED, HARASSED, AND SUBJECTED PLAINTIFF TO RETRIBUTION FOR HIS ACTIVITIES AS A JAIL-HOUSE LAWYER;

(N) DEFENDANTS PROMULGATED AN "ENGLISH SPEAKING ONLY" RULE, THAT DENIED PLAINTIFF HIS RIGHT TO FREEDOM OF SPEECH AND ASSOCIATION, AND EXPRESSION;

(O) DEFENDANTS DISPLAYED A "DELIBERATE INDIFFERENCE" TO PLAINTIFF'S MEDICAL NEEDS BY DENYING HIM PSYCHOLOGICAL AND PSYCHIATRIC TREATMENT WHILE SUBJECTING PLAINTIFF TO THEIR BEHAVIOR MODIFICATION PROGRAM;

(P) DEFENDANTS DENIED PLAINTIFF HIS STATE-CREATED LIBERTY INTEREST TO PARTICIPATE IN EDUCATIONAL, VOCATIONAL, AND COUNSELING PROGRAMS THAT ARE MANDATED BY STATE LAW;

SECOND CAUSE OF ACTION

THE ACTIONS OF DEFENDANTS STATED IN PARAGRAPHS 18 TO 54 DENIED PLAINTIFF HIS FOURTEENTH AMENDMENT RIGHTS.

THIRD CAUSE OF ACTION

THE ACTIONS OF THE DEFENDANTS STATED IN PARAGRAPHS 18 TO 54 VIOLATED STATE LAW, PLAINTIFF ALLEGES THAT THE DEFENDANTS ALSO VIOLATED THE HAWAII STATE CONSTITUTION ARTICLE 1 §§ 2, 3, 4, 9, AND 12, AND 14.

FOURTH CAUSE OF ACTION

THE ACTION OF THE DEFENDANTS STATED IN PARAGRAPH 18 TO 54 VIOLATED STATE LAW, AND THE UNITED STATES CONSTITUTION, TO THE FIRST, FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH OF FEDERAL LAW. PLAINTIFF ALSO ALLEGES

DEFENDANTS VIOLATED RULES AND REGULATIONS OF THE CORRECTIONS DIVISION POLICY AND PRACTICES.

RELIEF ASKED

WHEREFORE, PLAINTIFF REQUESTS THIS HONORABLE COURT TO GRANT THE FOLLOWING RELIEF:

(A) ISSUE A DECLARATORY JUDGMENT THAT THE DEFENDANTS POLICIES, PRACTICES, ACT, OMISSIONS, DESCRIBED IN THIS COMPLAINT VIOLATE PLAINTIFF'S RIGHTS TO HIM BY THE FIRST, FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HAWAII STATE CONSTITUTION ARTICLE 1 §§ 2, 3, 4, 9, 12, AND 14.

(B) GRANT COMPENSATORY DAMAGES IN THE FOLLOWING AMOUNTS;

\$175,000.00	DOLLARS AGAINST DEFENDANT THEODORE SAKAI
\$175,000.00	DOLLARS AGAINST DEFENDANT WILLIAM OKU
\$175,000.00	DOLLARS AGAINST DEFENDANT CINDA SANDIN
\$175,000.00	DOLLARS AGAINST DEFENDANT STATE OF HAWAII
\$175,000.00	DOLLARS AGAINST DEFENDANT HAROLD FALK
\$175,000.00	DOLLARS AGAINST DEFENDANT LAURENCE SHOHET

\$175,000.00	DOLLARS AGAINST DEFENDANT LEONARD GONSALVES
\$175,000.00	DOLLARS AGAINST DEFENDANT KIM THORBURN M.D.
\$175,000.00	DOLLARS AGAINST DEFENDANT FRANCIS SEQUEIRA
\$175,000.00	DOLLARS AGAINST DEFENDANT WILLIAM SUMMERS
\$175,000.00	DOLLARS AGAINST DEFENDANT ROBERT JOHNSON
\$175,000.00	DOLLARS AGAINST DEFENDANT GORDON FURTADO
\$175,000.00	DOLLARS AGAINST DEFENDANT ABRAHAM LOTA
\$175,000.00	DOLLARS AGAINST DEFENDANT EDWARD MARSHAL
\$175,000.00	DOLLARS AGAINST DEFENDANT WILLIAM PAAGA
\$175,000.00	DOLLARS AGAINST DEFENDANT BRIAN LEE

(C) GRANT PUNITIVE DAMAGES OF \$50,000.00 DOLLARS FROM EACH DEFENDANT.

(D) GRANT REASONABLE ATTORNEY FEE'S

(E) GRANT INJUNCTIVE RELIEF

(F) GRANT SUCH OTHER RELIEF AS IT MAY
APPEAR THAT PLAINTIFF IS ENTITLED.

RESPECTFULLY SUBMITTED

/s/ DeMont R.D. Conner
DeMONT R.D. CONNER
PRO SE
99-902 MOANALUA HWY.
AIEA, HAWAII 96701

DATED: HONOLULU, HAWAII, SEPTEMBER 6, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

ORDER REGARDING PLAINTIFF'S DISCOVERY
REQUESTS AND OTHER MATTERS

(Filed Nov. 7, 1989)

Plaintiff moved this Court for an order compelling answers to interrogatories. Hearing nothing from the Defendants, this Court ordered that Defendants respond by September 13, 1989 as to why they should not be compelled to answer Plaintiff's apparently valid discovery requests.

Defendants now state that this Court should stay discovery pending ostensibly a motion for summary judgment to test the qualified immunity of Defendants. However, Defendants only make vague references as to when they expect to file this motion; at this juncture, this Court is unwilling to stay valid discovery requests on such an assurance. Therefore, this Court hereby ORDERS that Defendants either file answers to interrogatories or their motion by November 27, 1989.

It is also ORDERED that Defendants file a response to Plaintiff's Motion for Order to Show Cause Why Defendants Should not be Held in Contempt for Violating page 4, paragraph B of the Preliminary Injunction filed on December 2, 1988 on November 27, 1989.

DATED: Honolulu, Hawaii, November 6, 1989.

/s/ Bert S. Tokairin
UNITED STATES
MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
[Caption Omitted In Printing]

ANSWER TO AMENDED COMPLAINT

(Filed Nov. 7, 1989)

Come now Defendants in the above-entitled action, through their attorneys, Warren Price, III, Attorney General, State of Hawaii, and Frank D.J. Kim, Deputy Attorney General, and answer the Amended Complaint as follows:

FIRST DEFENSE

The complaint fails to state a claim against Defendants, and each of them, upon which relief can be granted.

SECOND DEFENSE

1. Defendants admit the allegations contained in paragraph 2 of the complaint.

2. Defendants deny the allegations contained in paragraphs 1, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 30, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, and 54 of the complaint.

3. Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 27, 29, 31, 32, 33, and 34 of the complaint.

4. Defendants deny all other allegations not expressly admitted herein.

THIRD DEFENSE

Defendants are protected from liability by the doctrine of qualified immunity.

FOURTH DEFENSE

Defendants are protected from liability by the doctrine of sovereign immunity.

FIFTH DEFENSE

This action is precluded for lack of proper service of process and the lack of jurisdiction over Defendants.

SIXTH DEFENSE

This action is barred by the statute of limitations.

WHEREFORE, Defendants pray that the complaint herein be dismissed and that they be allowed their costs, reasonable attorney's fees, and such other relief as the Court deems appropriate.

DATED: Honolulu, Hawaii, November 7, 1989.

/s/ Frank D.J. Kim
FRANK D.J. KIM
Deputy Attorney General
Attorney for Defendants

NOV 16 1994

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1994

CINDA SANDIN, *Unit Team Manager,*
Halawa Correctional Facility,

Petitioner,

vs.

DeMONT R.D. CONNER, *et al.,*

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX
VOLUME II, PAGES 195 TO 375

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Petition For Certiorari Filed May 26, 1994
Certiorari Granted October 7, 1994

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
[Caption Omitted In Printing]

MOTION FOR SUMMARY JUDGMENT

(Filed Nov. 20, 1989)

Defendants, through their undersigned attorneys, hereby moved this Court for an order Granting Summary Judgment in their favor in the above-entitled action on the grounds that defendants are entitled to judgment in their favor as a matter of law.

This motion is made pursuant to Rule 56(b), Federal Rules of Civil Procedure, and is based upon the attached memorandum in support of motion for summary judgment, the affidavit and exhibits, and the pleadings, records and files herein.

DATED: Honolulu, Hawaii, Nov. 17, 1989, 1989.

STATE OF HAWAII

WARREN PRICE, III

Attorney General

State of Hawaii

/s/ Frank D. J. Kim

FRANK D.J. KIM

Deputy Attorney General

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
[Caption Omitted In Printing]

NOTICE

Defendants have moved for summary judgment against plaintiff who is a pro se prisoner litigant. The Ninth Circuit has recently held that a district court must advise a pro se prisoner litigant of what is required in response to a motion for summary judgment under Fed. R. Civ. P. 56. *Klinge v. Eikenberry*, 849 F.2d 409 (9th Cir. June 13, 1988) (citing, *Hudson v. Hardy*, 412 F.2d 1091 (D.C. Cir. 1968)).

Therefore, Plaintiff is hereby notified that failure to respond to the summary judgment motion will result in entry of judgment in favor of Defendants. *Hudson*, 412 F.2d at 1094. A summary judgment motion is a procedural device by which one party may obtain judgment if he or she persuades the court that the existence of certain material facts is undisputed and that he or she is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In this case, certain allegations such as challenges to particular, undisputed events may be capable of resolution as purely legal matters. For these claims, Plaintiff need only state his legal position as clearly as possible. Other claims in this action may involve factual issues where the parties disagree about whether certain incidents did or did not occur. For such factual claims, Plaintiff is required to respond to Defendants' summary judgment motion by submitting documents or factual affidavits which disagree with Defendants' showing with respect to some

material fact. Fed. R. Civ. P. 56(e). If necessary, Plaintiff may request further guidance from the court regarding the requirements of Rule 56.

Dated: Honolulu, Hawaii, Nov. 17, 1989.

Frank D. J. Kim
FRANK D. J. KIM
Attorney for Defendants

MEMORANDUM IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

I. INTRODUCTION

The original complaint was filed herein on May 10, 1988. By Order dated May 26, 1989, Plaintiff was given leave to file an amended complaint which was in fact not filed until September 8, 1989. The amended complaint is essentially an entirely new suit because it does not replead Plaintiff's original claims and adds defendants. It is 17 pages long, contains 54 numbered paragraphs and names 16 defendants including the State of Hawaii. It is full of conclusory statements but little fact.

The purported gist of the amended complaint appears to be that: Plaintiff's placement at and within the Halawa High Security Facility, i.e. Plaintiff's so-called "behavior modification program," violates his Fourteenth Amendment due process rights and the Eighth Amendment prohibition against cruel and unusual punishment; security measures such as the use of mechanical

restraints, strip searches and prohibitions against unauthorized inmate communications violate his Fourth and Eighth Amendment rights; and various defendants have engaged in retaliatory acts against him in violation of his unspecified rights.

II. FACTS

Plaintiff has been convicted of multiple violent crimes including attempted murder, kidnapping, burglary, robbery and rape. See Exhibit A. He has been sentenced to life imprisonment and his minimum term has been set at 30 years, which includes a 5-year consecutive sentence for escape. See Exhibit B.

While incarcerated, he has committed numerous misconducts involving assaults or attempted assaults on other inmates and staff, as well as misconducts involving threats to, interference with, harassment and abuse of staff. Exhibit C.

Plaintiff has twice attempted escape. The first time resulted in his conviction for attempted escape in the second degree on April 4, 1985. Exhibit A. The second attempt resulted in a misconduct charge on September 4, 1984. Exhibit D. In short, given the length of his sentence and his manifest predilection for violence, Plaintiff appears to present the stereo typical criminal over which the State has little control or leverage.

Plaintiff is considered a high custodial risk inmate and is incarcerated at Halawa High Security Facility which by law houses the State's most dangerous, predatory and high risk inmates. Exhibit E. Of necessity, the

high security facility is the most restrictive prison in the state system.

III. PLAINTIFF'S PLACEMENT DOES NOT VIOLATE HIS DUE PROCESS OR EIGHTH AMENDMENT RIGHTS

A. Due Process

Plaintiff's claim that his placement at and within the various phases at the High Security Facility violated his due process rights is without merit since his placement did not affect a liberty interest subject to audit under the due process clause.

Placement of a prisoner is primarily a matter within the discretion of prison officials. As stated by the U.S. Supreme Court in *Hewitt v. Helms*, 459 U.S. 460 (1983);

We have repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests. As to the first point, we have recognized that broad discretionary authority is necessary because the administration of a prison is "at best an extraordinarily difficult undertaking," *Wolff v. McDonnell*, *supra*, at 566, and have concluded that "to hold . . . that any substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal

courts." *Meachum v. Fano*, *supra*, at 225. As to the second point, our decisions have consistently refused to recognize more than the most basic liberty interests in prisoners. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948)

459 U.S. at 467.

Inmates do not have a liberty interest in remaining in the general population of inmates or enjoying the same privileges as inmates generally. In *Hewitt v. Helms*, 459 U.S. 460 (1983) the court held that inmates had no liberty interest in being in the general population of inmates rather than in a more restricted segregation. In *Hewitt* the inmate was found not guilty of misconduct, but was required to stay in a segregated and more restrictive area for security reasons. The court held that no liberty interest was involved because the prison officials had discretion to place the inmate in any section so long as there was no cruel and unusual punishment.

Accordingly, due process requirements have not been imposed even when placement has resulted in intra- or inter-state prison transfers. *Meachum v. Fano*, 427 U.S. 215 (1976); *Montanye v. Haynes*, 427 U.S. 236 (1976); and *Olim v. Wakinekona*, 461 U.S. 238 (1983).

In *Meachum* the issue before the court was:

The question here is whether the Due Process Clause of the Fourteenth Amendment entitles a state prisoner to a hearing when he is transferred to a prison the conditions of which

are substantially less favorable to the prisoner, absent a state law or practice conditioning such transfers on proof of serious misconduct or the concurrence of other events. We hold that it does not.

Meachum, 427 U.S. at 216.

In explaining its decision, the Court states:

The Fourteenth Amendment prohibits any State from depriving a person of life, liberty or property without due process of law. The initial inquiry is whether the transfer of respondents . . . infringed or implicated a "liberty interest of respondents within the meaning of the Due Process Clause. Contrary to the Court of Appeals, we hold that it did not. We reject at the outset the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause. . . .

Similarly, we cannot agree that *any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. The Due Process Clause by its own force forbids the State from convicting any person of crime and depriving him of his liberty without complying fully with the requirements of the Clause. But given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. . . . The conviction has sufficiently extinguished the defendant's liberty

interest to empower the State to confine him in any of its prisons.

Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose. That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules.

Meachum, 427 at 223-225.

See also the companion case *Montanye v. Haynes*, 427 U.S. 236 (1976) where the court upheld the transfer of an inmate, without hearing, after the inmate circulated a document in disregard of applicable prison rules. The U.S. Supreme Court extended its holdings in *Meachum* and *Montanye* to interstate prison transfers in *Olim v. Wakinekona*, 461 U.S. 238 (1983).

Nor does state law create a liberty interest entitling Plaintiff to due process protections. The U.S. Supreme Court in *Olim v. Wakinekona* expressly found that Hawaii's rules on classification, placement and transfer did not give rise to a state created liberty interest or otherwise implicate due process concerns.

In *Olim* an inmate raised due process challenges to his involuntary transfer to Folsom State Prison in California. The U.S. District Court for the District of Hawaii dismissed upon the basis that the Hawaii rules did not

give rise to a state created interest entitled to protection under the due process clause. The U.S. Court of Appeals for the Ninth Circuit reversed and held that the rules did create a liberty interest. On appeal to the U.S. Supreme Court, the court overruled the Ninth Circuit and expressly held that the state's rule (Rule IV, complementary Rules and Regulations attached hereto as Exhibit F) did not give rise to a state created liberty interest because "[t]he regulation contains no standards governing the Administrator's exercise of his discretion." *Olim v. Wakinekona*, at 243. In addressing this issue the court stated:

The Court of Appeals held that Hawaii's prison regulations create a constitutionally protected liberty interest. . . .

. . . [A] State creates a protected liberty interest by placing substantial limitations on official discretion. An inmate must show "that particularized standards of criteria guide the State's decisionmakers" . . . If the decisionmaker is not "required to base its decisions on objective and defined criteria" but instead "can deny the requested relief for any constitutionally permissible reason or for no reason at all" . . . the State has not created a constitutionally protected property interest.

Hawaii's prison regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under the Due Process Clause. As Rule IV itself makes clear, and as the Supreme Court of Hawaii has held in *Lono v. Ariyoshi*, 63 Haw., at 144-145, . . . the prison Administrator's discretion . . . is completely unfettered. No standards

govern or restrict the Administrator's determination. . . . [T]he Administrator is the only decisionmaker under Rule IV. . . .

Olim v. Wakinekona, 461 U.S. at 248-249.

Rule IV has been succeeded by sections 17-201-1, 17-201-2, 17-201-22, 17-201-23 and 17-201-24 of the State of Hawaii Administrative Rules. Copies of said sections are attached hereto as Exhibit G. Although the present rules are not exactly identical with Rule IV, the present rules are substantially similar to their precursor, Rule IV. The present rules do not restrict the administrator's discretion any more than did Rule IV. This similarity is *not* coincidental. A cursory comparison will reveal that the current rules provide even less basis to impute a state created liberty interest than did Rule IV.

[Material Deleted]

X. CONCLUSION

For the reasons stated above, defendants request this Court to grant their motion for summary judgment.

DATED: Honolulu, Hawaii, Nov. 17, 1989.

/s/ Frank D.J. Kim
FRANK D.J. KIM
Deputy Attorney General
Attorney for Defendants

[Caption Omitted In Printing]

AFFIDAVIT OF CINDA SANDIN

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF)
HONOLULU

CINDA SANDIN, after first being duly sworn, on oath deposes and says that:

1. She is the Residency Section Supervisor at Halawa High Security Facility and is familiar with DeMont Conner through her work.

2. Affiant is the custodian of records at Halawa High Security Facility.

3. Exhibits A through E and H through K are true and correct copies of documents in the institutional file of DeMont Conner, an inmate at Halawa High Security Facility.

4. The institutional file of DeMont Conner, as well as the institutional files of each inmate, is a business record of the Department which is kept in the regular course and conduct of its business and upon which the Department relies.

5. DeMont Conner is presently housed in Module B. The environment is clean. Wholesome food is provided, free clothing is furnished, and medical services are available. Conner may participate in two worklines (janitor or kitchen) and an education program. He has recreation

(one hour per weekday), store orders, law library, personal library, games, and color television. He receives daily monetary compensation although he is not employed.

6. The program at the High Security was designed by Laurence Shohet. He has a Masters Degree and extensive background in prison and psychiatric programs. The program was approved by the Corrections Department at the time of implementation.

7. Conner was provided with a copy of the *Inmate Handbook* which specifies what is expected of every inmate in the system. The expected behavior to progress in the program is to follow the module rules, handbook rules, and to maintain a positive and cooperative attitude with staff and other inmates.

8. The status of inmates in Disciplinary Segregation, Administrative Segregation, and Phase I is informally reviewed by the Unit Team on a daily basis. Formal reviews for Phase I are conducted every 30 days. The inmate is given written notice of the date of formal Phase I reviews. He may furnish a written statement to the Unit Team for consideration. He may also request to speak with staff. The status of inmates in the modules is reviewed periodically as needed. The inmate's custody review is conducted at least once a year by the case manager. Conner is presently in Module B. He has displayed poor self control, a disregard for the rules, and a very poor attitude throughout much of his incarceration.

9. Inmates receive one hour of outdoor recreation, five days a week, per schedule. It is impossible to provide access to the indoor gym to all inmates in the facility in

one day due to the need to separate inmates into small groups by quad for safety and security reasons. Recreation is rarely cancelled unless security or weather conditions dictate a need for cancellation.

10. For security and safety reasons, the cells in Special Holding are constructed with built-in furniture. This is to prevent suicides and assaults on staff. The food tray is completely wrapped in saran wrap prior to being slipped under the door. This method of food service is utilized as a security measure.

11. Inmates receive necessary medical and dental care. They may request psychiatric services whenever they feel the need. The facility has a psychiatrist, a psychologist, and numerous psychiatric social workers who are regularly available.

12. Weights are not in the Module A recreation yard as a safety and security precaution. Approximately one-half the Module A inmates have serious mental problems and many others are violent.

13. The inmate may order approved books through the library or from a publisher. They may be hard bound and are not required to be donated to the library. Inmates regularly subscribe to a wide variety of magazines.

14. English speaking inmates may not communicate in code or foreign languages. However Conner may pray quietly as required by his Muslim faith. He may not yell at odd hours with fellow Muslim inmates as this disturbs the sleep and routine of fellow inmates.

Further affiant sayeth naught.

/s/ Cinda Sandin
CINDA SANDIN

Subscribed and sworn to before me
this 20th day of November, 1989.

/s/ Cheryl B. DeMello
Notary Public, State of Hawaii
My commission expires: 2/23/92

EXHIBIT A

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
State of Hawaii

STATE OF HAWAII)	CR NO <u>57873</u>
)	
vs.)	JUDGMENT; NOTICE
)	OF ENTRY
DeMONT RAFAEL)	
DARWIN CONNER,)	I: Unauthorized Control
also known as Black)	of Propelled Vehicle
Rose and Dinky,)	(HPD No. Z-28572)
)	II: Driving Without
Defendant.)	License (HPD No.
)	Z-30040)
)	III: Promoting a
)	Detrimental Drug in
)	the Third Degree
)	(HPD No. Z-30060)
)	

(Filed April 30, 1984)

JUDGMENT

The above-named defendant having entered a plea of
GUILTY to

I: Unauthorized Control of Propelled Vehicle

II: Driving Without License

IT IS ADJUDGED that said above-named defendant has
been convicted of and is guilty of the offense of

I: Unauthorized Control of Propelled Vehicle

II: Driving Without License

committed in the manner and form set forth in the
charge.

IT IS THE JUDGMENT AND SENTENCE of the Court that the Defendant be committed to the custody of the Director of the Department of Social Services and Housing for imprisonment, mittimus to issue forthwith and until released in accordance with the law, as follows: Count I: 5 years; Count II: 1 year. Said sentence to be served concurrently with Cr. Nos. 59456 and 59458.

Dated: Honolulu, Hawaii, April 23, 1984

/s/ Melvin K. Soong
Judge of the above-entitled
Court [SEAL]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
State of Hawaii

STATE OF HAWAII)	CR NO <u>49458</u>
vs.)	JUDGMENT; NOTICE
)	OF ENTRY
DeMONT R. D.)	
CONNER, also known)	I: Kidnapping (HPD No.
as Black Rose)	D-14731)
and David L. Tavares,)	II: Assault in the Third
Defendant.)	Degree (HPD No.
)	D-14731)
)	

(Filed April 30, 1984)

JUDGMENT

The above-named defendant having entered a plea of NOT GUILTY and having been found GUILTY after a jury-waived trial of

I: Kidnapping
II: Assault in the Third Degree

IT IS ADJUDGED that said above-named defendant has been convicted of and is guilty of the offense of

I: Kidnapping
II: Assault in the Third Degree

committed in the manner and form set forth in the charge.

IT IS THE JUDGMENT AND SENTENCE of the Court that the Defendant be committed to the custody of the Director of the Department of Social Services and Housing for imprisonment, mittimus to issue forthwith and until released in accordance with the law, as follows: Count I: 20 years; Count II: 1 year. Said sentence to be served concurrently with Cr. Nos. 59456 and 57873.

Dated: Honolulu, Hawaii, April 23, 1984

/s/ Melvin K. Soong
Judge of the above-entitled
Court [SEAL]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
State of Hawaii

STATE OF HAWAII)	CR NO 59456
vs.)	JUDGMENT; NOTICE
)	OF ENTRY
DeMONT R. D. CONNER,)	I: Kidnapping (HPD
also known as David L.)	No. D-09835)
Tavares,)	II: Terroristic
Defendant.)	Threatening in the
)	First Degree (HPD
)	No. D-09835-1)
)	III: Robbery in the
)	First Degree (HPD
)	No. D-09835-2)
)	

(Filed April 30, 1984)

JUDGMENT

The above-named defendant having entered a plea of NOT GUILTY and having been found GUILTY after a jury-waived trial of

- I: Kidnapping
- II: Terroristic Threatening in the First Degree
- III: Robbery in the First Degree

IT IS ADJUDGED that said above-named defendant has been convicted of and is guilty of the offense of

- I: Kidnapping
- II: Terroristic Threatening in the First Degree
- III: Robbery in the First Degree

committed in the manner and form set forth in the charge.

IT IS THE JUDGMENT AND SENTENCE of the Court that the Defendant be committed to the custody of the Director of the Department of Social Services and Housing for imprisonment, mittimus to issue forthwith and until released in accordance with the law, as follows: Count I: 10 years; Count II: 5 years; Count III: 20 years. Said sentence to be served concurrently with Cr. Nos. 59458 and 57873.

Dated: Honolulu, Hawaii, April 23, 1984

/s/ Melvin K. Soong
Judge of the above-entitled
Court [SEAL]

**IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
State of Hawaii**

STATE OF HAWAII)	CR NO 59460
)	JUDGMENT; NOTICE OF
vs.)	ENTRY
DeMONT R. D.)	COUNT I:
CONNER, also known)	RAPE IN THE FIRST
as David L. Tavares)	DEGREE
and Mr. D,)	COUNTS II AND III:
Defendant.)	SODOMY IN THE FIRST
)	DEGREE
)	COUNTY IV:
)	KIDNAPPING
)	(HPD NOS. D-02468;
)	D-02468-1; D-02468-2;
)	D-02468-3)

(Filed July 27, 1984)

JUDGMENT

The above-named defendant having entered a plea of not guilty and having been found guilty of all charges upon trial by jury on June 14, 1984,

IT IS ADJUDGED that said above-named defendant has been convicted of and is guilty of the offense of RAPE IN THE FIRST DEGREE (COUNT I), SODOMY IN THE FIRST DEGREE (COUNTS II and III), and KIDNAPPING (COUNT IV), committed in the manner and form set forth in the charge.

IT IS THE JUDGMENT AND SENTENCE of the Court that the defendant be committed to the custody of the Director of the Department of Social Services and Housing pursuant to H.R.S. § 706-661 for extended terms

of imprisonment of life as to each of COUNTS I, II, III and IV, said sentences to run concurrently.

Mittimus to issue forthwith.

Dated: Honolulu, Hawaii, July 26, 1984

/s/ Leland H. Spencer
Judge of the above-entitled
Court

**IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
State of Hawaii**

STATE OF HAWAII)	CR NO 60121
)	JUDGMENT; NOTICE
vs.)	OF ENTRY
DeMONT R. D. CONNER,)	ORIGINAL CHARGES:
Defendant.)	I & V - ATTEMPTED
)	MURDER
)	II & VI - ROBBERY IN
)	THE FIRST DEGREE
)	III & VII -
)	KIDNAPPING
)	IV & VIII - BURGLARY
)	IN THE FIRST DEGREE
)	IX - SEXUAL ABUSE
)	IN THE FIRST DEGREE
)	X - ATTEMPTED
)	SODOMY IN THE
)	FIRST DEGREE
)	(D-07255-1; D-07229;
)	D-07255; D-07229-1;
)	D-07255-2; D-07229-2;
)	D-07255; D-07229-3;
)	D-07229-4; & D-07229)

(Filed Aug. 23, 1984)

JUDGMENT

The above-named defendant having entered a plea of Not Guilty and a jury on August 22, 1984, having found the Defendant Guilty

IT IS ADJUDGED that said above-named defendant has been convicted of and is guilty of the offense of ATTEMPTED MURDER, Counts I & V; ROBBERY IN THE FIRST DEGREE, Counts II & VI; KIDNAPPING, Counts III & VII; BURGLARY IN THE FIRST DEGREE, Counts IV & VIII; SEXUAL ABUSE IN THE FIRST DEGREE, Count IX committed in the manner and form set forth in the charge.

IT IS THE JUDGMENT AND SENTENCE of the court that the defendant be committed to the custody of the Director of the Department of Social Services and Housing, OAHU COMMUNITY CORRECTIONAL CENTER, for an imprisonment term of life in Counts I & V, TWENTY (20) YEARS in Counts II & VI, TEN (10) YEARS in Counts III & VII, TEN (10) YEARS in Counts IV & VIII, and FIVE (5) YEARS in Count IX, until released in accordance with the law. Said sentences to run concurrently with any other sentence Defendant is now serving. MITTIMUS TO ISSUE FORTHWITH.

Dated: Honolulu, Hawaii, August 22, 1984

/s/ Ronald B. Greig
Judge of the above-entitled
Court

**AMENDED JUDGMENT
GUILTY CONVICTION AND SENTENCE**

☐ Young Adult Defendant
NOTICE OF ENTRY

STATE OF HAWAII

CIRCUIT COURT OF THE
FIRST CIRCUIT

CASE NUMBER

CR. 84-0491

STATE OF HAWAII VS (DEFENDANT)
DeMONT RAFAEL DARWIN CONNER,
also known as David Lopaka Tavares
and Black Rose

POLICE REPORT NUMBER
H-29454

DEFENDANT'S PLEA
☒ GUILTY ☐ NOT GUILTY ☐ NO CONTEST
☐ JURY VERDICT ☐ JUDGE FINDINGS

ORIGINAL CHARGE(S)
ASSAULT IN THE SECOND DEGREE

CHARGE TO WHICH DEFENDANT PLEAD
ASSAULT IN THE SECOND DECREE [sic]

DEFENDANT IS CONVICTED AND FOUND GUILTY OF
ASSAULT IN THE SECOND DEGREE

FINAL JUDGMENT AND SENTENCE OF THE COURT
☐ FINE \$ _____ TO BE PAID TO THE CLERK OF
COURT

☐ RESTITUTION \$ _____
☒ INCARCERATION
☒ MITTIMUS TO ISSUE IMMEDIATELY

☐ MITTIMUS STAYED UNTIL _____

☐ OTHER:

YEARS MONTHS DAYS

5, with a mandatory minimum of 5 years, to run concurrently with Cr. 84-0553 and consecutively with any other sentence Defendant is presently serving.

☒ The Defendant entered the plea(s) indicated. It is adjudged that the Defendant has been convicted of and is guilty of the offense stated above, committed in the manner and form set forth in the charge.

☐ The court finds that the Defendant comes within the classification of a young adult defendant under HRS Section 667 and that in lieu of any other sentence of imprisonment authorized by law, defendant should be sentenced to a special indeterminate term of imprisonment. The court is of the opinion that such special term is adequate for defendant's correction and rehabilitation and will not jeopardize the protection of the public.

THE JUDGMENT AND SENTENCE OF THIS COURT IS AS STATED HEREIN.

DATE SIGNED

APR. 8, 1985

JUDGE

ROBERT G. KLEIN

SIGNATURE

/s/ Robert G. Klein

NOTICE OF ENTRY

THIS JUDGMENT HAS BEEN ENTERED AND COPIES MAILED OR DELIVERED TO ALL PARTIES.

DATE

APR. 8, 1985

[SEAL]

CLERK

L. Akamoto

JUDGMENT

GUILTY CONVICTION AND SENTENCE

☐ Young Adult Defendant

NOTICE OF ENTRY

STATE OF HAWAII

CIRCUIT COURT OF THE

FIRST CIRCUIT

CASE NUMBER

CR. 84-0553

STATE OF HAWAII VS (DEFENDANT)

DeMONT CONNER

POLICE REPORT NUMBER

H-18179

DEFENDANT'S PLEA

☒ GUILTY ☐ NOT GUILTY ☐ NO CONTEST

☐ JURY VERDICT ☐ JUDGE FINDINGS

ORIGINAL CHARGE(S)

ATTEMPTED ESCAPE IN THE SECOND DEGREE

CHARGE TO WHICH DEFENDANT PLEAD
 ATTEMPTED ESCAPE IN THE SECOND DEGREE
 DEFENDANT IS CONVICTED AND FOUND GUILTY OF
 ATTEMPTED ESCAPE IN THE SECOND DEGREE
 FINAL JUDGMENT AND SENTENCE OF THE COURT
☐ FINE \$ _____ TO BE PAID TO THE CLERK OF
 COURT
☐ RESTITUTION \$ _____
☒ INCARCERATION
☐ MITTIMUS TO ISSUE IMMEDIATELY
☐ MITTIMUS STAYED UNTIL _____
☐ OTHER:

YEARS MONTHS DAYS

5, to run concurrently with Cr. 84-0491 and consecutively
 with any other sentence Defendant is presently serving.

☒ The Defendant entered the plea(s) indicated. It is
 adjudged that the Defendant has been convicted of and is
 guilty of the offense stated above, committed in the man-
 ner and form set forth in the charge.

☐ The court finds that the Defendant comes within the
 classification of a young adult defendant under HRS Sec-
 tion 667 and that in lieu of any other sentence of
 imprisonment authorized by law, defendant should be
 sentenced to a special indeterminate term of imprison-
 ment. The court is of the opinion that such special term is
 adequate for defendant's correction and rehabilitation
 and will not jeopardize the protection of the public.

THE JUDGMENT AND SENTENCE OF THIS COURT
 IS AS STATED HEREIN.

DATE SIGNED
 APRIL 4, 1985

JUDGE
 ROBERT G. KLEIN

SIGNATURE
 /s/ Robert G. Klein

NOTICE OF ENTRY

THIS JUDGMENT HAS BEEN ENTERED AND COPIES
 MAILED OR DELIVERED TO ALL PARTIES.

DATE
 APRIL 4, 1985

CLERK
 L. Akamoto

[SEAL]

**JUDGMENT
GUILTY CONVICTION AND SENTENCE**

☐ Young Adult Defendant
NOTICE OF ENTRY

STATE OF HAWAII

CIRCUIT COURT OF THE
FIRST CIRCUIT

CASE NUMBER

CR. 85-0110

STATE OF HAWAII VS (DEFENDANT)
DeMONT CONNER

POLICE REPORT NUMBER
D-10954, D-09835, D-11230

DEFENDANT'S PLEA

☒ GUILTY ☐ NOT GUILTY ☐ NO CONTEST
☐ JURY VERDICT ☒ JUDGE FINDINGS

ORIGINAL CHARGE(S)

COUNTS I & VI: BURGLARY 1°
COUNT II: ROBBERY 1°
COUNT IV: ASSAULT 2°
COUNT V: KIDNAPPING

CHARGE TO WHICH DEFENDANT PLEAD

DEFENDANT IS CONVICTED AND FOUND GUILTY OF
COUNTS I & VI: BURGLARY 1°
COUNT II: ROBBERY 1°
COUNT IV: ASSAULT 2°
COUNT V: KIDNAPPING (CLASS B)

FINAL JUDGMENT AND SENTENCE OF THE COURT

☐ FINE \$ _____ TO BE PAID TO THE CLERK OF
COURT

☒ RESTITUTION \$ amount to be determined by Adult
Probation Division & approved by the Court, manner
of payment to be determined by Hawaii Paroling
Authority.

☒ INCARCERATION

☒ MITTIMUS TO ISSUE IMMEDIATELY

☐ MITTIMUS STAYED UNTIL _____

☐ OTHER:

YEARS	MONTHS	DAYS
20*/life**/10***		

*as to each of Counts I, V, VI.

**as to Count II.

***as to Count IV. Terms to be served concurrently with
any other term of imprisonment heretofore imposed upon
Defendant.

☒ The Defendant entered the plea(s) indicated. It is
adjudged that the Defendant has been convicted of and is
guilty of the offense stated above, committed in the man-
ner and form set forth in the charge.

☐ The court finds that the Defendant comes within the
classification of a young adult defendant under HRS Sec-
tion 667 and that in lieu of any other sentence of
imprisonment authorized by law, defendant should be
sentenced to a special indeterminate term of imprison-
ment. The court is of the opinion that such special term is
adequate for defendant's correction and rehabilitation
and will not jeopardize the protection of the public.

THE JUDGMENT AND SENTENCE OF THIS COURT
IS AS STATED HEREIN.

DATE SIGNED

6/20/85

JUDGE

DONALD K. TSUKIYAMA

SIGNATURE

/s/ D. Tsukiyama

NOTICE OF ENTRY

THIS JUDGMENT HAS BEEN ENTERED AND COPIES
MAILED OR DELIVERED TO ALL PARTIES.

DATE

JUN 24 1985

CLERK

B. NAGATA

I do hereby certify that this is a full, true, and correct
copy of the criminal on file in this office.

B. Nagata

Clerk, Circuit Court

FIRST CIRCUIT COURT

STATE OF HAWAII

JUN 24 1985

10:20 o'clock A.M.

B. Nagata

Clerk 11th Division

EXHIBIT "B"

[SEAL DELETED]

STATE OF HAWAII
HAWAII PAROLING AUTHORITY

NOTICE AND ORDER FIXING MINIMUM TERM(S) OF IMPRISONMENT

In the Matter of DeMONT R.D. CONNER 576-98-9907
A Prisoner

HAVING been duly convicted and sentenced as fol-
lows:

First Circuit:

Conviction Date	Offense & Criminal Number	Sentence Date	Maximum Sentence
3/14/84	Unauthorized Con- trol of Propelled Vehicle, Count I #57873	4/23/84	5 years CC
3/ 7/84	Kidnapping, Count I #59456	4/23/84	10 years CC
3/ 7/84	Terroristic Threaten- ing First Degree, Count II #59456	4/23/84	5 years CC

You are hereby notified that following a Hearing on
September 12, 1984, it is the order of the Hawaii Paroling
Authority that minimum term(s) of imprisonment is fixed
as follows:

Offense & Criminal Number	Minimum Term
Unauthorized Control of Propelled Vehicle, Ct. I, #57873	3 Years
Kidnapping, Ct. I, #59456	8 Years
Terroristic Threatening First Degree, Ct. II, #59456	5 Years

DATED: Honolulu, Hawaii, State of Hawaii, September 27, 1984

HAWAII PAROLING AUTHORITY

/s/ _____
Chairman

I do hereby certify that the foregoing is a full, true and correct copy of the original on file.

Executive Secretary

I certify that a true and correct copy of this document was served to the prisoner on October __, 1984, by [] Mail [] Personal service.

/s/ _____

Secretary
Signature and Title
Hawaii Paroling Authority
Agency

[SEAL DELETED]

STATE OF HAWAII
HAWAII PAROLING AUTHORITY

NOTICE AND ORDER FIXING MINIMUM
TERM(S) OF IMPRISONMENT

In the Matter of DeMONT R.D. CONNER 576-98-9907
A Prisoner

HAVING been duly convicted and sentenced as follows:

First Circuit:

Conviction Date	Offense & Criminal Number	Sentence Date	Maximum Sentence
3/7/84	Robbery First Degree Count III #59456	4/23/84	20 years CC
3/ 8/84	Kidnapping, Count I #59458	4/23/84	20 years CC
6/14/84	Rape First Degree, Count I #59460	7/26/84	Life CC

You are hereby notified that following a Hearing on September 12, 1984, it is the order of the Hawaii Paroling Authority that minimum term(s) of imprisonment is fixed as follows:

Offense & Criminal Number	Minimum Term
Robbery First Degree, Ct. III, #59456	8 Years
Kidnapping, Ct. I, #59458	10 Years
Rape First Degree, Ct. I, #59460	20 Years

DATED: Honolulu, Hawaii, State of Hawaii, September 27, 1984

HAWAII PAROLING AUTHORITY

/s/ _____
Chairman

I do hereby certify that the foregoing is a full, true and correct copy of the original on file.

Executive Secretary

I certify that a true and correct copy of this document was served to the prisoner on October __, 1984, by [/] Mail [] Personal service.

/s/ _____
Secretary
Signature and Title
Hawaii Paroling Authority
Agency

[SEAL DELETED]

STATE OF HAWAII
HAWAII PAROLING AUTHORITY

NOTICE AND ORDER FIXING MINIMUM
TERM(S) OF IMPRISONMENT

In the Matter of DeMONT R.D. CONNER 576-98-9907
A Prisoner

HAVING been duly convicted and sentenced as follows:

First Circuit:

Conviction Date	Offense & Criminal Number	Sentence Date	Maximum Sentence
6/14/84	Sodomy First Degree, Cts, II & III #59460	7/26/84	Life CC
6/14/84	Kidnapping, Count IV #59460	7/26/84	Life CC

You are hereby notified that following a Hearing on September 12, 1984, it is the order of the Hawaii Paroling Authority that minimum term(s) of imprisonment is fixed as follows:

Offense & Criminal Number	Minimum Term
Sodomy First Degree, Cts. II & III, #59460	20 Years
Kidnapping, Ct. IV, #59460	20 Years

DATED: Honolulu, Hawaii, State of Hawaii, September 27, 1984

HAWAII PAROLING AUTHORITY

/s/ _____
Chairman

I do hereby certify that the foregoing is a full, true and correct copy of the original on file.

Executive Secretary

I certify that a true and correct copy of this document was served to the prisoner on October __, 1984, by [] Mail [] Personal service.

/s/ _____
Secretary
Signature and Title
Hawaii Paroling Authority
Agency

[SEAL DELETED]

STATE OF HAWAII
HAWAII PAROLING AUTHORITY

NOTICE AND ORDER FIXING MINIMUM
TERM(S) OF IMPRISONMENT

In the Matter of DeMONT R.D. CONNER 576-98-9907
A Prisoner

HAVING been duly convicted and sentenced as follows:

First Circuit:

Conviction Date	Offense & Criminal Number	Sentence Date	Maximum Sentence
8/22/84	Attempted Murder, Cts. I & V, #60121	8/22/84	LIFE
8/22/84	Robbery First Degree, Cts. II & VI, #60121	8/22/84	20 Years
8/22/84	Kidnapping, Cts. III & VII, #60121	8/22/84	10 Years
8/22/84	Burglary First Degree, Cts. IV & VIII, #60121	8/22/84	10 Years
8/22/84	Sexual Abuse First Degree, Ct. IX, #60121	8/22/84	5 Years

You are hereby notified that following a Hearing on January 14, 1985, it is the order of the Hawaii Paroling Authority that minimum term(s) of imprisonment is fixed as follows:

Offense & Criminal Number	Minimum Term
Attempted Murder, Cts. I & V, #60121	25 Years
Robbery First Degree, Cts. II & VI, #60121	20 Years
Kidnapping, Cts. III & VII, #60121	10 Years
Burglary First Degree, Cts. IV & VIII, #60121	10 Years
Sexual Abuse First Degree, Ct. IX, #60121	5 Years

DATED: Honolulu, Hawaii, State of Hawaii, February 6, 1985

HAWAII PAROLING AUTHORITY

/s/ _____
Chairman

I do hereby certify that the foregoing is a full, true and correct copy of the original on file.

/s/ _____
Executive Secretary

I certify that a true and correct copy of this document was served to the prisoner on February __, 1985, by [/] Mail [] Personal service.

/s/ _____
Secretary
Signature and Title
Hawaii Paroling Authority
Agency

CRIME	PAROLED:	EXPIRES	DISCHARGED:	EXPIRES
59456 (Ct 1: Kidnapping)	10 yrs	9/16/93	8 yrs	9/16/91
(Ct. 2: Terr Thrting 1)	5 yrs	9/16/88	5 yrs	9/16/88
(Ct. 3: Robbery 1)	20 yrs	9/16/2003	8 yrs	9/16/91
59458 (Ct 1: Kidnapping)	20 yrs	9/14/2003	10 yrs	9/14/93
(Ct. 2: Assault 3)	1 yr	-	-	-
57873 (Ct. 1: UCPV)	5 yrs	8/24/88	3 yrs	8/24/86
(Ct. 2: DWOL)	1 yr	-	-	-
59460 (Ct. 1: Rape 1)	Life ea	-	-	-
(Ct. 2 & 3: Sodomy 1)	-	-	-	-
(Ct. 4: Kidnapping)	-	-	-	-
60121 (Cts. 1 & 5; Attem. Murder)	Life	-	-	-
(Cts. 2 & 6: Rob. 1)	20 yrs	3/15/2004	20 yrs	9/15/2003
(Cts. 3 & 7: Kidnap.)	10 yrs	3/15/94	20 yrs	9/15/2003
(Cts. 4 & 8: Burg. 1)	10 yrs	3/15/94	20 yrs	9/15/2003
(Ct. 9: Sex. Abuse. 1)	5 yrs	3/15/89	25 yrs	3/15/2009
84-0491 (Assault 2°)	5 yrs cs	-	20 yrs	3/15/2004
84-0553 (Attpd Escape 2°)	5 yrs cs	-	10 yrs	3/15/94
85-0110 (Cts 1 & 6: Burglary 1°)	*20 & *20 yrs	2/01/2005	10 yrs	3/15/94
(Ct 2: Robbery 1°)	*LWP	-	5 yrs	3/15/89
(Ct 4: Assault 2°)	*10 yrs cc	-	5 yrs cs	11/1/2013
(Ct. 5: Kidnapping)	*20 yrs	2/1/2005	5 yrs	11/14/2013
			20 & 20 yrs	2/01/2005
			25 yrs	2/1/2010
			10 yrs	2/1/95
			20 yrs	2/1/2005

*Restitution to be made.

EXHIBIT C

CHRONOLOGICAL ACTION

NAME: CONNER, DeMont Rafael Darwin
 aka: Black R NO. 576-98-9907
 Dinky
 David Lopaka Tavares

Apr. 23, 1984 Committed by First Circuit Court.
 Already at OCCC/Dorm 6.

July 20, 1984 Moved from Corr. C to Dorm 3.

August 13, 1984 Moved from Dorm 1 to Corr. C.

August 15, 1984 Moved from Corr. C to HU-2nd

September 4, 1984 #1 Destroying, altering, or damaging
 government property, or the property
 of another person resulting [sic] in dam-
 age less than \$50 (1 count) and #6
 Attempting or planning to escape [sic]
 (1 count). Guilty, confined to Holding
 Unit, first phase, a period of 30 days.

Aug. 31, 1984 Moved from HU to Dorm 3.

Sept. 4, 1984 Moved from Dorm 3 to HU-1st.

Sept. 10, 1984 Security/Custody Classification: S5/
 MAX.

Nov. 8, 1984 #4 The use of force on or threats to a
 correctional worker of the workers
 family
 #11 Refusing to obey an order. #5
 Using abusive or obscene language to a
 staff

#12 Harassment of employees. Guilty
 of all charges, confined to the Holding
 Unit 1st Phase 60 days for #4, 14 days
 #11, consecutive. Charges #5 and #12
 to be including. 17 dyas [sic] time
 served. Committee recommends inmate
 be referred to the Program Committee
 for reprogramming to Halawa.

Jan. 2, 1985 Moved from HU-1 to HU-2.

Mar. 5, 1985 Your request to receive inmate compen-
 sation for the month of Feb. 1985 has
 been approved.

May 7, 1985 Request to receive Inmate Compensa-
 tion for the month of Jan. 1985 has been
 approved.

May 8, 1985 Moved from HU-2nd to HU-3rd.

May 9, 1985 Report of Misconduct: #4 - assaulting
 any person without a weapon or dan-
 gerous instrument, and #15 - lying or
 providing false information. 44 days
 holding unit, suspended for 2 months.

June 27, 1985 #3 Assaulting any person. #11 Refusing
 to obey an order. Guilty. To be confined
 to the HU/1st, for 60 days, 7 days time
 served credited, to serve 23 days com-
 mencing 7/1/85 to 7/24/85. Remaining
 30 days to be suspended for 6/months.

Aug. 19, 1985 Admitted to HHSF - Intake placement
 status pending assessment.

Aug. 21, 1985 Transferred back to OCCC.

Aug. 13, 1985 #1 Fighting with another person (1 count). Guilty. Time serve credited. Moved from the 3rd. floor UH to 2nd floor HU/1st phase.

Sept. 3, 1985 Transferred from OCCC to HHSF.

Sept. 3, 1985 Admitted to HHSF on intake placement status pending assessment.

Sept. 5, 1985 Placement in Module A.

Oct. 1, 1985 Transferred to Module 5 due to housing shortage.

Oct. 18, 1985 Religious counseling approved on Fridays with Harry Fujihara.

Dec. 5, 1985 APA: Approved for religious [sic] counseling with Mr. Chee and Mr. Souza every Thursday, excluding holidays, from 9:15 to 10 a.m.

Dec. 13, 1985 Reclassification: S-5/Max.

Mar. 7, 1986 APA - Transferred to Module C.

Mar. 7, 1986 APA - Placement onto Module C Floorboy workline.

Apr. 17, 1986 APA - Transferred from Module C Floorboy to Kitchen workline.

August 1986 Approved for Bible Correspondence Course.

Dec. 13, 1986 Reclassification: Remain at S-5/Max.

Jan. 15, 1987 Misconduct: Inmate's plea of guilty accepted. Disposition: 30 days disciplinary segregation w/15 days credit time - from 1/1/87 to 1/30/87.

Jan. 30, 1987 End of disciplinary segregation. Placed on Phase I.

Feb. 9, 1987 Early review on Phase I. Placed in general population of Module A.

Feb. 20, 1987 Religious counseling approved with Henry Chee.

April 28, 1987 MISCONDUCT REPORT: 17-201-7 #7) Destroying, altering, or damaging government property . . . \$500 - \$999.99. Findings - NOT GUILTY

Sept. 14, 1987 temporarily housed at HMSF, SH unit

Aug. 28, 1987 Misconduct: 17-201-7 (14) & (16): The use of physical interference or obstacle resulting in the obstruction, hinderance [sic], or impairment of the performance of a correctional function by a public servant.

Aug. 28, 1987 Disp - not guilty of 17-201-7(14) & (16) Charges expunged

Aug. 28, 1987 Misconduct: 17-201-9 (5) Using abusive or obscene language to a staff member

Aug. 28, 1987 Disp: 4 hours disciplinary segregation concurrent.

Aug. 28, 1987 Misconduct. 17-201-9 (12) Harassment of employees. Disp. 4 hours disciplinary segregation concurrent.

Oct. 15, 1987 NOTICE OF REPORT OF MISCONDUCT: 17-201-8 #11) Refusing to obey . . . 17-201-9 #5) Using obscene language . . . Findings - GUILTY of both Corrective Action D/S 14 days concurrent (10-16-87 to 10-29-87).

- Oct. 17, 1987 MISCONDUCT REPORT: 17-201-9 #5)
Using abusive or obscene language . . .
Findings - GUILTY Corrective Action -
No recreation 2 weeks. (10-26 to 11-
illegible)
- 7/20/88 APA 30 day review for Phase I was
conducted. Next review is 8/18/88
- Nov. 10, 1987 MISCONDUCT: 17-201-7(14) use of
physical interference or obstacle result-
ing in the obstruction, hindurance [sic],
or implairment [sic] of the performance
of a correctional function by a public
servant & 17-201-8(11) refusing to obey
an order of any staff member. Not
Guilty
- Nov. 19, 1987 MISCONDUCT: 17-201-7(14) use of
physical interference or obstacle result-
ing in the obstruction, hindurance [sic],
or impairment of the performance of a
correctional function by a public ser-
vant & 17-201-8(11) refusing to obey an
order of any staff member. GUILTY: 30
days for violating 17-201-7(14) and 14
days for violating 17-201-8(11). start
Nov. 26, 1987 and end Dec. 26, 1987
- Nov. 23, 1987 MISCONDUCT: 17-201-6(4) use of force
on or threats to a correctional officer or
the worker's family, 17-201-7(14) use of
physical interference or obstacle result-
ing in the obstruction, hindrance, or
impairment of the performance of a
correctional function by a public ser-
vant, 17-201-8(11) refusing to obey an
order of any staff member, 17-201-9(5)

- using abusive or obscene language to a
staff member. GUILTY on all four
counts 60 days for 17-201-6(4), 30 days
for 17-201-7(14), 14 days for
17-201-8(11), and 4 hours for
17-201-9(5) - all time runs concurrent.
starting Nov. 26,1 [sic] 1987, and end-
ing Jan. 25, 1988.
- Dec. 2, 1987 MISCONDUCT: 17-201-6(4) use of force
on or threats to a correctional worker
or the worker's family; 17-201-8(11)
refusing to obey an order of any staff
member (red line); 17-201-8(11) refus-
ing to obey an order of any staff mem-
ber (water faucet). Disp. guilty on two
charges and charge 17-201-8(11) inap-
propriate. 60 days for violating rule
17-201-6(4) and 14 days for
17-201-8(11). All time run concurrent
with time received from Nov. 25, 1987
hearing. starts Nov. 26, 1987 end Jan 25,
1988.
- Dec. 2, 1987 MISCONDUCT: 17-201-8(11) refusing
to obey an order of any staff member
DISP. GUILTY 14 days to run concur-
rent with time received from hearing
held on Nov. 25, 1987, which started
Nov. 26, 1987 and ends Jan. 25, 1988.
- Dec. 14, 1987 MISCONDUCT: 17-201-6(4) use of force
on or threats to a correctional worker
or worker's family, 17-201-8(11) Refus-
ing to obey an order of any staff mem-
ber 17-201-9(5) using abusive or
obscene language to a staff member.
GUILTY - 30 dyas [sic] from Dec. 21,
1987 to Jan. 20, 1988

Jan. 12, 1988 MISCONDUCT: 17-201-7(4) Assault not guilty

March 1, 1988 APA - approved for religious counseling with Henry Chee.

May 7, 1988 MISCONDUCT: 17-201-6(3) assaulting any person, with or without a dangerous instrument, causing bodily injury
Disp - Disp - 60 days seg (minus 18 days pre-hearing detention). Time to start May 10 - June 20, 1988

June 20, 1988 APA - Disciplinary segregation ends 6/20/88. Will be placed onto Phase I. Next review is 7/20/88.

July 5, 1988 RECLASSIFICATION REVIEW: Custody remains Max. Next review is 12/23/88.

July 31, 1988 MISCONDUCT: 17-201-6 (4) Guilty of violation. To receive 60 days segregation commencing 8/22/88 ending 10/20/88.

Sept. 12, 1988 MISCONDUCT: 17-201-9(5) using abusive or obscene language to staff members 17-201-9(12) harassment of employees Disp - loss of privileges from 9/26/88 - 10/10/88.

Oct. 13, 1988 MISCONDUCT: 17-201-9(5) using abusive or obscene language to a staff member loss of privileges for 15 days from 10/17/88 - 11/1/88.

Oct. 20, 1988 APA - Disciplinary segregation ended 10/20/88. Will be placed onto Phase I. Next review is tentatively scheduled for 11/19/88.

Nov. 2, 1988 MISCONDUCT: 17-201-8(11) refusing to obey an order of any staff member 17-201-9(5) using abusive or obscene language to a staff member. 17-201-6(4) the use of force on or threats to a correctional worker or the worker's family. Disp - 60 days discip seg from 11/14/88 - 1/12/89.

Jan. 11, 1989 Segregation ends 1/11/89. Next level Phase I from 60 - 120 days. Next review February 11, 1989.

Feb. 10, 1989 30 day review for Phase I was conducted Next review 3/12/89.

Jan. 21, 1989 MISCONDUCT: 17-201-8(11) Refusing to obey an order of any staff member. DISPOSITION: GUILTY, segregation 14 days. Time to start 2/21/89 - 3/6/89.

Feb. 22, 1989 MISCONDUCT: 17-201-8(11) Refusing to obey an order of any staff member. DISPOSITION: NOT GUILTY.

Feb. 7, 1989 RECLASSIFICATION: Custody status, "MAX" score 28 pts. Next review Dec. 23, 1989.

Feb. 27, 1989 MISCONDUCT: 17-201-8911) refusing to obey an order of any staff member Disp - 14 days seg from 3/21/89 - 4/3/89.

Mar. 14, 1989 MISCONDUCT: 17-201-8(11) refusing to obey an order of any staff member Disp - 14 days seg from 4/2/80 - 4/15/89.

Mar. 22, 1989 MISCONDUCT: 17-201-9(5) using abusive or obscene language to staff member 17-201-9(12) harassment of employees Disp extra duty for 14 days from 3/26/89 - 4/8/89.

April 11, 1989 Seg ends 4/15/89. Placed onto Phase I with next review 5/15/89.

Mar. 28, 1989 MISCONDUCT: 17-201-8(10) possession of anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate or ward through regular institutional channels. Disp 14 days from 4/15/89-4/28/89.

April 27, 1989 Seg ends & placed onto Phase I with review on 5/28/89.

May 31, 1989 Placed [sic] onto Phase I. Next review 6/28

june 26, 1989 transferred to module A

june 9, 1989 approved for counseling with Rev. Rasool

june 7, 1989 MISCONDUCT: 17-201-79(14) use of physical interference or obstacle 17-201-8(11) refusing to obey an order of any staff member - charges dropped because charging officer was not present.

Sept. 13, 1989 transferred to module B

EXHIBIT F
[EXHIBIT "D" OMITTED]

IV

THE CLASSIFICATION PROCESS1. GENERAL:

An inmate's/ward's classification determines where he is best situated within the Corrections Division. Rather than being concerned with isolated aspects of the individual or punishment (as is the adjustment process), classification is a dynamic process which considers the individual, his history, his changing needs, the resources and facilities available to the Corrections Division, the other inmates/wards, the exigencies of the community, and any other relevant factors. It never inflicts punishment; on the contrary, even the imposition of a stricter classification is intended to be in the best interests of the individual, the State, and the community. In short, classification is a continuing evaluation of each individual to ensure that he is given the optimum placement within the Corrections Division.

2. COMPOSITION:

The facility administrator shall establish an impartial Program Committee composed of at least three members who were not actively involved in the process by which the inmate/ward was brought before the Committee. The facility administrator shall not sit as a member of the Committee.

3. PROCEDURE:

So long as a transfer involves a grievous loss to the inmate/ward, the following procedures adhere. Grievous loss is generally defined as a serious loss to a reasonable man. Thus, transfer from Hawaii State

Prison to Kulani Honor Camp would normally not cause a grievous loss.

- a. Pre-hearing detention. An inmate/ward should not be detained pending hearing longer than four working days, except where emergency conditions require a longer period of detention which shall be a reasonable time.
- b. Notice. The inmate/ward has the right to prior notice that a Program Committee hearing will be held involving him.
 - (1) Within a reasonable time, not less than 24 hours prior to the hearing, the inmate/ward shall be served with written notice of the time and place of the Program Committee hearing and what the Committee will consider at the hearing. The notice should briefly state what the classification process involves, that it considers everything in his file, and any recent specific facts which may weigh significantly in the classification process. If the inmate/ward waives the 24 hour period, it shall be reduced to writing and signed by the inmate/ward on the face of the notice.
 - (2) The inmate/ward and/or his counsel substitute (as described below) shall have the opportunity to review all relevant nonconfidential information, that may be considered by the Committee, during the period between the notice and the hearing.
- c. Hearing. The inmate/ward has a right to appear during the Program Committee hearing if a change, modification, or transfer is planned which would result in a grievous loss. If the

inmate/ward declines to attend the hearing, it shall be held regardless of his absence.

- (1) The Committee shall explain the nature of the classification process and generally what the Committee is considering at the hearing.
- (2) Evidence shall be presented to the Committee in the presence of the inmate/ward. The inmate/ward should be advised that he has a right to remain silent, but that his silence may be used as a permissible inference of evidence against him.
- (3) Confrontation and cross-examination:
 - (a) The inmate/ward may be given the privilege to confront and cross-examine adverse witnesses.
 - (b) However, the Committee may deny confrontation and cross-examination and identification of adverse witnesses if in its judgment to do so would:
 - (i) subject the witness(es) to potential reprisal;
 - (ii) jeopardize the security and/or good government of the facility; or
 - (iii) be otherwise unduly hazardous to the facility's safety or correctional goals.
 - (c) If confrontation and cross-examination and identification of adverse witnesses are denied, the Committee may, but is not required to, enter in the record of the proceeding and make available to the inmate/ward an explanation for the denial. Additionally, the inmate/ward

shall be given an oral or written summary of the testimony against him and provided an opportunity to respond.

- (4) Opportunity to be heard: The inmate/ward shall be given an opportunity to respond to any and all evidence and offer evidence on his behalf.
 - (a) He should be permitted to call witnesses and present evidence on his behalf so long as it will not be unduly hazardous to institutional safety or correctional goals.
 - (b) The Committee may deny the inmate's/ward's calling of certain witnesses or presentation of certain evidence for reasons such as: irrelevance; lack of necessity; the hazards presented in individual cases; or any other justifiable reason. In this regard, the Committee retains the discretion to keep the hearing within reasonable limits and refuse the presentation of evidence or the calling of witnesses, keeping in mind the right of the inmate/ward to be heard. The Committee is encouraged, but is not required, to state the reason(s) for the refusal.
- (5) Counsel substitute: No inmate/ward shall be represented by an attorney at the Program Committee hearing. He will be permitted to employ counsel-substitute which shall constitute a member of the facility staff who did not actively participate in the process by which the individual was brought before the Committee or, in the facility administrator's discretion, a sufficiently competent inmate designated by the facility staff.

d. Findings. The inmate/ward has a right to be apprised of the findings of the Program Committee.

- (1) Upon completion of the hearing, the Committee may take the matter under advisement and will render a recommendation based only upon evidence presented at the hearing to which the individual had an opportunity to respond or any evidence which may subsequently come to light after the formal hearing. The inmate/ward's silence may be used as a permissible inference of evidence against him, although reprogramming must be based upon more than his mere silence.
- (2) The inmate/ward shall be given a brief written summary of the Committee's findings within a reasonable period of time after the hearing, which findings shall be entered in his file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken. The findings may properly exclude certain items of evidence if necessitated by personal or institutional safety and goals; the fact that evidence has been omitted and the reason(s) therefore must be set forth in the findings.
- (3) The facility administrator will, within a reasonable period of time, review the Program Committee's recommendation. He may, as the final decisionmaker:
 - (a) Affirm or reverse, in whole or part, the recommendation; or

- (b) hold in abeyance any action he believes jeopardizes the safety, security, or welfare of the staff, inmate/ward, other inmates/wards, institution, or community and refer the matter back to the Program Committee for further study and recommendation.

4. REVIEW:

Each inmate/ward has the right to seek administrative review of the decision through the grievance process. Review shall be initiated within fourteen calendar days of receipt of the final decision.

EXHIBIT "K"

(PARTIAL)

STATE OF HAWAII
DEPARTMENT OF CORRECTIONS
CORRECTIONS DIVISION
Halawa Correctional Facility
99-902 Moanalua Highway
AIEA, HAWAII 96701

TELEPHONE
487-7289

WILLIAM OKU
ADMINISTRATOR

May 16, 1988

Mr. DeMont Conner
99-902 Moanalua Highway
Aiea, Hawaii 96701

Dear Mr. Conner:

A review of the Adjustment Committee results of August 31, 1988 has been completed.

Based on this review, it has been determined that the charge of 17-201-7 (14) & (16): The use of physical interference or obstacle resulting in the obstruction, hinderance [sic], or impairment of the performance of a correctional function by a public servant is inappropriate. Accordingly, I am ordering that all references to a finding of guilt in this charge be expunged.

Sincerely,

/s/ Henry Pikini
Henry Pikini
Deputy Administrator

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

OPPOSITION TO DEFENDANTS MOTION
FOR SUMMARY JUDGMENT WITH CROSS-MOTION
FOR SUMMARY JUDGMENT

(Filed JAN. 8, 1990)

COME NOW PLAINTIFF DeMONT R.D. CONNER, AND HEREBY MOVES THIS COURT PURSUANT TO RULES 56(2) AND (E) TO GRANT PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT IN HIS FAVOR FOR THOSE ISSUES SOUGHT TO BE RESOLVED VIA THIS MOTION ON THE GROUNDS THAT PLAINTIFF IS ENTITLED TO JUDGMENT IN HIS FAVOR AS A MATTER OF LAW, AND TO DENY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THERE EXISTS CONSIDERABLE EVIDENCE ON RECORD IN THE ABOVE-ENTITLED ACTION TO DISPUTE DEFENDANTS ASSERTION AND SUPPORTS PLAINTIFF'S CLAIMS.

THIS MOTION IS BASED ON THE ATTACHED MEMORANDUM IN SUPPORT OF MOTION, AFFIDAVIT OF DeMONT R.D. CONNER AND EXHIBITS, AS WELL AS THE FILES AND RECORDS HEREIN.

DATED: HONOLULU, HAWAII, DECEMBER 26, 1989.

RESPECTFULLY SUBMITTED,

/s/ DeMont R.D. Conner
DeMONT R.D. CONNER,
PRO SE
99-902 MOANALUA HWY,
AIEA, HAWAII 96701

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

MEMORANDUM IN SUPPORT

I. Introduction

THE ORIGINAL COMPLAINT WAS FILED HEREIN ON MAY 10, 1988, BY ORDER DATED MAY 26, 1989, PLAINTIFF WAS GIVEN LEAVE TO FILE AN AMENDED COMPLAINT WHICH PLAINTIFF FILED SEPTEMBER 8, 1989. THE DEFENDANTS IN THEIR MOTION FOR SUMMARY JUDGMENT - MEMORANDUM (HEREINAFTER "DEF. MEMO") CLAIMS THAT THE AMENDED COMPLAINT IS AN ENTIRELY NEW SUIT "BECAUSE IT DOES NOT REPLEAD PLAINTIFF'S ORIGINAL CLAIMS AND ADDS DEFENDANTS". IN FACT ON PAGE 10 OF PLAINTIFF'S AMENDED COMPLAINT, AT NO. 43, PLAINTIFF REPLEADS HIS CAUSE-OF-ACTION AGAINST DEFENDANT SANDIN, ONLY PLAINTIFF - AFTER A CLOSER REVIEW OF THE INCIDENT LEADING UP TO DEFENDANT SANDIN'S ACTIONS - HAS ADDED "COMSPIRACY [sic]" TO DEFENDANT SANDIN'S ACTIONS ON TOP OF HER ACTS OF DEPRIVING PLAINTIFF OF DUE PROCESS IN THE AUGUST 28, 1987 ADJUSTMENT COMMITTEE HEARING.

THE DEFENDANTS FURTHER ASSERT THAT PLAINTIFF'S AMENDED COMPLAINT "IS FULL OF CONCLUSORY STATEMENTS BUT LITTLE FACT." PLAINTIFF CONTENDS THAT AS A PRO SE PLAINTIFF HE IS ENTITLED TO BE HELD TO "LESS STRINGENT STANDARDS THAN FORMAL PLEADINGS DRAFTED

BY LAWYERS" *HAINES VS. KERNER*, 404 U.S. 519, 92 S.CT. 594 (1972); *ACCORD, HUGHES VS. ROWE*, 449 U.S. 5, 101 S.CT. 173 (1980). NONETHELESS, IF PLAINTIFF HAS FAILED TO ADEQUATELY STATE HIS FACTS, HE DIRECTS ALL PARTIES CONCERNED TO ALL SUBSEQUENT PLEADINGS - LIKE THIS ONE - SUBMITTED BY PLAINTIFF AS HE WILL ATTEMPT TO MAKE HIS FACTS MUCH CLEARER.

THE DEFENDANTS ALSO CONTEND THAT PLAINTIFF'S "PURPORTED GIST OF THE AMENDED COMPLAINT APPEARS TO BE THAT: PLAINTIFF'S PLACEMENT AT AND WITHIN THE HALAWA HIGH SECURITY FACILITY, I.E. PLAINTIFF'S SO-CALLED "BEHAVIOR MODIFICATION PROGRAM", VIOLATES HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS AND THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT". . . . "THE DEFENDANTS CONTENTION IS MISPLACED AND PATENTLY FRIVOLOUS, FOR PLAINTIFF DOES NOT CHALLENGE HIS TRANSFER AND PLACEMENT" AT AND WITHIN THE HALAWA HIGH SECURITY FACILITY," AS IT IS OBVIOUSLY APPARENT FROM PLAINTIFF'S INSTITUTIONAL FILE AND FROM HIS CRIMINAL CONVICTIONS THAT THE HIGH SECURITY FACILITY IS A PROPER PLACE FOR INMATES WHO POSE SUCH A THREAT TO THE COMMUNITY AND TO THE PRISON ENVIRONMENT. BUT, DOES THIS GIVE DEFENDANTS THE RIGHT TO DO WITH PLAINTIFF WHATEVER THEIR WHIMS DESIRE? NO! DOES PLAINTIFF FORFEIT HIS RIGHT TO BE FREE FROM THE ARBITRARY ACTIONS OF DEFENDANT PRISON OFFICIALS? CERTAINLY NOT!

THEREBY, PLAINTIFF DOES NOT CHALLENGE BEING PLACED IN THE HIGH SECURITY FACILITY PER SE, INSTEAD PLAINTIFF CHALLENGES "WHAT THE DEFENDANTS CALL" THEIR BEHAVIOR MODIFICATION SYSTEM: "SEGREGATION AND MAXIMUM CONTROL PROGRAM", PLAINTIFF IS SAYING THAT:

1. DEFENDANTS' SEGREGATION AND MAXIMUM CONTROL PROGRAM IS A RULE THAT GOVERNS THE ENTIRE HALAWA HIGH SECURITY FACILITY AND BECAUSE IT IS A RULE OF SUCH, SAID RULE IS UNCONSTITUTIONAL!
2. THAT VARIOUS ASPECTS OF DEFENDANTS PHASING SYSTEM RUN AFOUL TO PLAINTIFF'S RIGHTS UNDER THE CONSTITUTION.

THE REMAINING ISSUES THAT DEFENDANTS CITE IN THEIR MEMORANDUM WHICH PLAINTIFF CHALLENGES I.E. STRIP SEARCHES; MECHANICAL RESTRAINTS; UNAUTHORIZED INMATE COMMUNICATION IN FOREIGN LANGUAGE; RETALIATION; EXERCISE; FORM 106; REHABILITATION ARE ABOUT AS CLOSE TO WHAT PLAINTIFF IS CHALLENGING.

DEFENDANTS ALSO RAISE DEFENSES OF THEIR OWN THAT THEY BELIEVE THEY ARE ENTITLED TO:

1. SOVEREIGN IMMUNITY;
2. QUALIFIED IMMUNITY;

II. FACTS

PLAINTIFF DOES NOT DISPUTE DEFENDANTS CONTENTION THAT "PLAINTIFF. . . . PRESENT THE STEREO TYPICAL CRIMINAL" . . . [AND] "IS CONSIDERED A HIGH CUSTODIAL RISK INMATE AND IS INCARCERATED AT HALAWA HIGH SECURITY FACILITY WHICH BY LAW HOUSES THE STATE'S MOST DANGEROUS, PREDATORY AND HIGH RISK INMATES." DEFENDANT'S CONTENTION IN THIS RESPECT CANNOT BE DISPUTED BY PLAINTIFF.

NEVERTHELESS, THE FACT STILL REMAINS THAT:

"BUT THOUGH HIS RIGHTS MAY BE DIMINISHED BY THE NEEDS AND EXIGENCIES OF THE INSTITUTIONAL ENVIRONMENT, A PRISONER IS NOT WHOLLY STRIPPED OF CONSTITUTIONAL PROTECTIONS WHEN HE IS IMPRISONED FOR CRIME. THERE IS NO IRON CURTAIN DRAWN BETWEEN THE CONSTITUTION AND THE PRISONS OF THIS COUNTRY." (EMPHASIS ADDED) WOLFF VS. MCDONNELL, 418 U.S. 539, 555-56, 94 S.C.T. 2963 (1974) (CITATIONS OMITTED).

III. DEFENDANTS' ARGUEMENT [sic] CONCERNING, "PLAINTIFF'S PLACEMENT DOES NOT VIOLATE HIS DUE PROCESS OR EIGHTH AMENDMENT RIGHTS" IS WHOLLY MISPLACED AND PATENTLY FRIVOLOUS

AS STATED EARLIER, THE DEFENDANTS' ARGUEMENT [sic] CONCERNING PLAINTIFF'S PLACEMENT

IS WHOLLY MISPLACED AND IS PATENTLY FRIVOLOUS. THE ISSUE IS NOT PLAINTIFF'S PLACEMENT AT AND WITHIN THE VARIOUS PHASES AT THE HIGH SECURITY FACILITY. THE ISSUE IS WHETHER DEFENDANTS' "SEGREGATION AND MAXIMUM CONTROL PROGRAM" OR "S.M.C.P." VIOLATES PLAINTIFF'S:

1. DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION;

IF IT IS FOUND THAT THE SEGREGATION AND MAXIMUM CONTROL PROGRAM (HEREINAFTER "S.M.C.P.") VIOLATES PLAINTIFF'S STATE-CREATED ENTITLEMENT TO BE FREE FROM RULES NOT MADE IN ACCORDANCE WITH ESTABLISHED RULE-MAKING PROCEDURES, THEN PLAINTIFF REQUESTS THAT THIS COURT DENY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THIS ISSUE AND INSTEAD GRANT PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT ON THIS ISSUE.

A. DUE PROCESS

THE FIRST QUESTION THAT SHOULD BE RESOLVED BEFORE RESOLVING THE QUESTION OF WHAT PROCESS IS DUE TO PLAINTIFF, IS THAT THIS COURT SHOULD LOOK TO SEE IF PLAINTIFF HAVE BEEN DEPRIVED OF A LIBERTY OR PROPERTY INTEREST.

THE UNITED STATES SUPREME COURT HAS HELD THAT "LIBERTY INTERESTS" OR "PROPERTY

INTERESTS" PROTECTED BY DUE PROCESS MAY ARISE IN TWO WAYS: FROM THE CONSTITUTION ITSELF, *CF. PROCUNIER VS. MARTINEZ*, 416 U.S. 396, 417-19, 94 S.CT. 1800 (1974); *ACCORD, VITEK VS. JONES*, 445 U.S. 480, 491-94, 100 S.CT. 1254 (1980), OR FROM STATE OR FEDERAL STATUTES, RULES, OR UNDERSTANDINGS. *CONNECTICUT BOARD OF PARDONS VS. DUMSCHAT*, 452 U.S. 458, 465, 101 S.CT. 2460 (1981).

IN THE CASE-AT-BAR, PLAINTIFF ALLEGES THAT STATE LAW, STATUTES, RULES AND REGULATIONS TOGETHER GIVES PLAINTIFF A "STATE-CREATED LIBERTY INTEREST" (OR "ENTITLEMENT") TO NOT BE SUBJECTED TO RULES THAT HAVE NOT BEEN MADE IN ACCORDANCE WITH RELEVANT RULE MAKING PROCEDURES. "[R]ULES WHICH ARE NOT APPROVED BY THE GOVERNOR AND FILED WITH THE LIEUTENANT GOVERNOR AS REQUIRED BY H.A.P.A. (HAWAII ADMINISTRATIVE PROCEDURE ACT) §§ 91-3(B) AND 91-4(B)(2), BY THE FACT OF THAT FAILURE ALONE HAVE NO "FORCE OR EFFECT" *AGUIAR VS. H.H.A.*, 55 HAW. 478, 522 P.2D 1255 (1974) (*CITING OTANI VS. CONTRACTORS LICENSE BOARD*, 51 HAW. 673, 676, 466 P.2D 1009, 1011 (1970); *SEE ALSO STATE VS. LEE*, 51 HAW. 516, 522, 465, P.2D 573, 577 (1970).

HERE, THE "RULES" THAT PLAINTIFF ALLEGES IS IN VIOLATION OF HIS STATE-CREATED LIBERTY INTEREST, IS DEFENDANTS' FALK, SAKAI, OKU AND SHOHET'S "SEGREGATION AND MAXIMUM CONTROL PROGRAM." DEFENDANTS DO NOT DISPUTE PLAINTIFF'S CONTENTION THAT THERE "SEGREGATION AND MAXIMUM CONTROL PROGRAM"

(HEREIN AFTER "S.M.C.P.") IS A "RULE" THAT GOVERNS THE ENTIRE HALAWA HIGH SECURITY FACILITY'S INMATES. INDEED, FOR DEFENDANTS TO DISPUTE THAT THEIR S.M.C.P IS NOT A "RULE" THAT "GOVERNS" THE HIGH SECURITY "FACILITY" WOULD BE FRIVOLOUS AS *H.A.P.A. ID. STATES IN PERTINENT PART:*

" 'RULES' MEANS EACH AGENCY STATEMENT OF GENERAL OR PARTICULAR APPLICABILITY AND FUTURE EFFECT THAT IMPLEMENT, INTERPRETS OR PRESCRIBES LAW OR POLICY, OR DESCRIBES THE ORGANIZATION, PROCEDURE, OR PRACTICE REQUIREMENT OF ANY AGENCY . . . " HAWAII REVISED STATUTES § 91-1(4). (HAW.REV.STAT.)"

COMPARE EXHIBIT "A" (WHICH IS A TRUE AND CORRECT COPY OF THE POLICY AND PROCEDURES FOR DEFENDANTS' S.M.P.C.) WITH EXHIBIT "B" AT PAGE 2-5 LAST PARAGRAPH. (EXHIBIT ATTACHED HERETO). BASED ON THE UNDISPUTED FACT THAT THE S.M.C.P. IS A "RULE" GOVERNING THE ENTIRE H.H.S. FACILITY, IT IS CLEAR THAT STATE LAW REQUIRES DEFENDANTS TO VALIDATE THEIR RULES IN ACCORDANCE WITH RULE-MAKING PROCEDURES, *SEE HAW. REV.STAT. § 91-3(C)* WHICH STATES IN PERTINENT PART:

"THE ADOPTION, AMENDMENT, OR REPEAL OF ANY RULE BY ANY STATE AGENCY SHALL BE SUBJECT TO THE APPROVAL OF THE GOVERNOR . . . "

COMPARE WITH THE SIMILAR LANGUAGE OF HAW.REV.STAT. § 353-3 AND TITLE 17 ADMINISTRATIVE RULES OF CORRECTIONS [sic] DIVISION § 17-200-1(A) ATTACHED HERETO AS EXHIBITS "C" AND "D" RESPECTIVELY. SEE ALSO *WILDER VS. TANOUE*, 753 P.2D 816 WHERE THE INTERMEDIATE COURT OF APPEALS FOR THE STATE OF HAWAII HELD THAT "RULES" WITHIN THE MEANING OF RELEVANT STATUTES APPLY [IN THE CONTEXT OF INSTITUTIONS] TO RULES GOVERNING A FACILITY AND NOT TO RULES THAT GOVERN ONLY A PARTICULAR HOUSING UNIT OF A FACILITY. IT SHOULD BE STATED HERE THAT THE S.M.C.P. HAS FOUR LEVELS OF SEQUENTIAL GRADIENTS OF PROGRAMMING I.E. "PHASE ONE", MODULE "A", "B", AND "C"; PLAINTIFF DOES NOT AT THIS POINT CHALLENGE THE GUIDELINES SET FORTH FOR EACH LEVEL, INSTEAD PLAINTIFF CHALLENGES [sic] THE HEAD OF THE LEVEL PROGRAM WHICH DICTATES HOW EACH LEVEL SHALL BE CONTROLLED [sic] ETC. NAMELY THE S.M.C.P.

IT IS ALSO UNDISPUTED BY DEFENDANTS THAT THEY DID NOT SEEK, NOR DID THEY OBTAIN THE APPROVAL OF THE GOVERNOR WHEN THEY SOUGHT TO APPLY THEIR S.M.C.P. AS A FACILITY RULE (SEE ALSO EXHIBIT "E" ATTACHED HERETO, WHICH SUPPORTS THE FACT THAT APPROVAL FOR DEFENDANTS' S.M.C.P. WENT ONLY AS HIGH AS HAVING THE DIRECTOR OF CORRECTIONS' ASSISTANT IDENTIFIED AS MS. EDITH WILHELM TO SIGN FOR THE DIRECTOR OF CORRECTIONS - MR. KAKESAKO, AT PAGE 3 NO. 8) IT IS OBVIOUS THAT

THE DEFENDANTS ARE IN CLEAR VIOLATION OF STATE LAW, STATUTES, RULES, REGULATIONS, AND POLICY AND PROCEDURES.

THUS, THE QUESTION PLAINTIFF PRESENTS IS WHETHER THE AFOREMENTIONED STATE REGULATIONS ETC. GIVE PLAINTIFF A STATE-CREATED LIBERTY INTEREST TO NOT BE SUBJECTED TO RULES WHICH HAVE NO FORCE OR EFFECT OF LAW? PLAINTIFF CONTENDS THAT IT DOES.

IT IS CLEAR THAT NOT EVERY STATE STATUTE OR REGULATION CREATES A LIBERTY INTEREST. ONLY IF A STATUTE OR REGULATION LIMITS THE DISCRETION OF STATE OFFICIALS BY PROVIDING THAT THEY "MAY" OR "MUST" TAKE SOME ACTION ONLY UNDER CERTAIN PRESCRIBED CIRCUMSTANCES DOES THE STATUTE OR REGULATION CREATE A LIBERTY INTEREST OR "ENTITLEMENT". *HEWITT VS. HELMS*, 459 U.S. 460, 466, 103 S.CT. 864, 871 (1983) ("THE REPEATED USE OF EXPLICITLY MANDATORY LANGUAGE IN CONNECTION WITH REQUIRING SPECIFIC SUBSTANTIVE PREDICATES DEMANDS A CONCLUSION THAT THE STATE HAS CREATED A PROTECTED LIBERTY INTEREST"); *TOUSSAINT VS. MCCARTHY*, 801 F.2D 1080, 1089 (9TH CIR.1986), *CERT. DENIED*, 107 S.CT. 2462 (1987).

HERE, IT IS INDISPUTABLE THAT, EITHER ALONE OR COMBINED, THE RULE-MAKING PROCEDURES OF THE HAWAII ADMINISTRATIVE PROCEDURE ACT ("H.A.P.A.") § 91-3(C) WHICH IS CROSSED REFERENCED BY HAWAII REVISED STATUTES § 353-3 (SEE EXHIBIT "C" ATTACHED) AND § 17-200-1(A) OF TITLE

17 ADMINISTRATIVE RULES OF CORRECTIONS DIVISION (SEE EXHIBIT "D" ATTACHED)" CONTAIN EXPLICIT MANDATORY LANGUAGE IN CONNECTION WITH REQUIRING THE APPROVAL OF THE GOVERNOR [A SPECIFIC SUBSTANTIVE PREDICATE], THUS, A DEMANDING CONCLUSION THAT THE STATE HAS CREATED A PROTECTED LIBERTY INTEREST". HEWITT, SUPRA.

THEREFORE, AS IT IS ALSO REQUIRED BY STATE LAW THAT STATES:

"... THE COURT SHALL DECLARE THE RULE INVALID IF IT FINDS IT VIOLATES THE CONSTITUTIONAL OR STATUTORY PROVISIONS OR EXCEEDS THE STATUTORY AUTHORITY AND WAS ADOPTED WITHOUT COMPLIANCE WITH STATUTORY RULE-MAKING PROCEDURE." HAW.REV.STAT. § 91-7(B) (EMPHASIS ADDED)

THIS COURT IS BOUND BY THE STATE LEGISLATURES DICTATION OF RULE-MAKING PROCEDURES AND THE JUDGMENTS OF THE HAWAII STATE SUPREME COURT PURSUANT TO 28 U.S.C.A. § 1738. *PIATT VS. MACDOUGALL*, 773 F.2D 1032 (9TH CIR. 1985).

FURTHERMORE, DEFENDANTS ARE NOT ENTITLED TO "DEFERENCE" STANDARD THAT HAS BEEN LONG ACCORDED TO PRISON AUTHORITIES, SEE *TURNER VS. SAFLEY*, 107 S.CT. 2254, AT 2259, AS THERE COULD NOT BE ANY "REASONABLENESS" TO A RULE IMPLEMENTED IN VIOLATION OF CLEARLY ESTABLISHED CASE LAW. ON THE OTHER HAND, HAD DEFENDANTS FOLLOWED RULE-MAKING PROCEDURES WHEN THEY SOUGHT TO SUBJECT

INMATES TO THEIR S.M.C.P., THEN PLAINTIFF WOULD MOST LIKELY NOT SUCCEED ON CHALLENGING THE "EXISTANCE" OF THIS RULE. HOWEVER, THIS IS NOT THE CASE HERE, THE S.M.C.P. AS A "RULE" ACCORDING TO ESTABLISHED RULE-MAKING PROCEDURES IS ILLEGAL AND HAVE "NO FORCE OR EFFECT" OF LAW. THEREFORE, PLAINTIFF HAS AN INHERENT RIGHT, UNDER THE RULE-MAKING PROCEDURES, TO NOT BE SUBJECTED TO ILLEGAL RULES. THEREFORE, BECAUSE OF DEFENDANTS CONTINUED ENFORCEMENTS OF THEIR ILLEGAL S.M.C.P. "RULE" WHICH INFRINGES ON PLAINTIFF'S RIGHTS UNDER THE DUE PROCESS AND EQUAL PROTECTION OF THE LAW, PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT IN HIS FAVOR FOR THIS ISSUE SHOULD BE GRANTED AND DEFENDANTS MOTION FOR A SUMMARY JUDGMENT IN THEIR FAVOR SHOULD BE DENIED.

B. DUE PROCESS AS APPLIED TO PARTICULAR POLICIES AND PRACTICES OF DEFENDANTS FALK, SAKAI, OKU AND SHOHET'S PHASING PROGRAM

PLAINTIFF AGREES WITH THE COURT IN *SIMS*, (EXHIBIT "B") THAT "CERTAIN PARTICULAR POLICIES AND PRACTICES APPEAR TO RUN AFOUL OF THE CONSTITUTION". SEE 3RD PARAGRAPH ON PAGE 19 OF EXHIBIT "B". PLAINTIFF SEEKS TO HAVE THIS COURT TO GRANT HIM SUMMARY JUDGMENT ON THESE ISSUES.

TO THE EXTENT THAT DEFENDANTS CONTEND THAT PLAINTIFF'S PLACEMENT WITHIN THE VARIOUS PHASES AT THE HIGH SECURITY FACILITY IS WITHOUT MERIT SINCE HIS PLACEMENT DID NOT AFFECT A LIBERTY INTEREST SUBJECT TO AUDIT UNDER THE DUE PROCESS CLAUSE. DEFENDANTS POSITION IS SIMPLY ERRONEOUS.

WHILE PHASING PROGRAMS PER SE MAY NOT BE UNCONSTITUTIONAL. PLAINTIFF CONTENDS THAT - AT LEASE [sic] IN THIS ARGUMENT [sic] - PARTICULAR POLICIES AND PRACTICES OF THE PHASING PROGRAM ARBITRARILY INFRINGE UPON PLAINTIFF'S CONSTITUTIONAL RIGHTS.

THE FIRST ASPECT THAT DEFENDANTS INFRINGE UPON PLAINTIFF'S CONSTITUTIONAL RIGHTS IS BY DENYING PLAINTIFF PERIODIC REVIEWS OF HIS CONFINEMENT.

IT IS UNDISPUTED BY DEFENDANTS THAT THEY DO NOT PROVIDE PLAINTIFF WITH PERIODIC REVIEWS OF HIS CONFINEMENT IN MODULES "A", "B" OR "C", NOR DO THEY DISPUTE THAT THEY DO NOT ALLOW PLAINTIFF TO HAVE ANY MEANINGFUL PARTICIPATION IN THEIR 30 REVIEWS CONDUCTED WHILE PLAINTIFF IS IN PHASE ONE I.E. PHYSICAL OR WRITTEN. SEE ALSO PARAGRAPH 3 ON PAGE 8 OF EXHIBIT "B". THESE DEPRIVATIONS ADDED TO THE FACT THAT "DEFENDANTS USE PHASING TO PUNISH INMATES. TITLE 17'S REGULATIONS CREATED A LIBERTY INTEREST IN BEING FREE FROM PUNISHMENT. THEREFORE, [PLAINTIFF] HAVE A LIBERTY INTEREST IN NOT BEING CONFINED

UNDER THE PHASING PROGRAM". PARAGRAPH 3 PAGE 26 EXHIBIT "B". SEE §§ 17-201-6 THROUGH 17-201-20 EXHIBIT "F". COMPARE PARAGRAPH 3 ON PAGE 23 EXHIBIT "B".

AS THE REVIEWING COURT IN SIMS, EXHIBIT "B", STATED: "THE TOUCHSTONE OF DUE PROCESS IS PROTECTION OF THE INDIVIDUAL AGAINST ARBITRARY ACTION OF GOVERNMENT". WOLFF VS. MCDONNELL, 418 U.S. 539, 558 (1974) PARAGRAPH 4 ON PAGE 26 EXHIBIT "B". PLAINTIFF TAKES THE SAME POSITION AS THE REVIEWING COURT IN SIMS IN APPLYING THE PROCEDURAL REQUIREMENTS ENUMERATED ON PAGES 27-32 OF EXHIBIT "B" WITH RELEVANT CASE LAW TO SUPPORT HIS REQUEST THAT THIS COURT GRANT PLAINTIFF SUMMARY JUDGMENT ON THIS ISSUE IN HIS FAVOR AS THERE IS NO DIFFERENCE FROM THE ISSUES IN THIS ARGUMENT [sic] AND THE FACTS THAT WAS FOUND IN THE SIMS CASE. ALSO, THIS COURT SHOULD DENY DEFENDANTS REQUEST FOR SUMMARY JUDGMENT IN THEIR FAVOR ON THIS ISSUE.

OTHER POSITIONS THAT PLAINTIFF TAKES THAT ARE THE SAME AS THE ISSUES, FACTS, AND RELEVANT CASE LAW AS SET FORTH IN SIMS, EXHIBIT "B" ARE:

1. EXERCISE;
2. RELIGIOUS
 - (I) RELIGIOUS COUNSELING AND
 - (II) RELIGIOUS LITERATURE;

3. INCOMING MAIL; AND
4. WRITTEN RULES;

THE DEFENDANTS DISPUTES THAT THEIR DECISION TO LIMIT OUTDOOR EXERCISE TO FIVE HOURS PER WEEK IS BASED ON SOUND ADMINISTRATIVE CONSIDERATIONS, AS WELL AS VALID PENOLOGICAL OBJECTIVES. YET, THE ONLY "OBJECTIVES" AND "CONSIDERATIONS" THEY OFFER ARE THAT WHILE IN PUNITIVE ISOLATION AN INMATE IS IN THE RECREATION YARD ALONE AND THAT THIS FACT PRESENTS "OBVIOUS SECURITY REASONS", AND THAT IT WOULD BE DIFFICULT TO PERMIT EACH INMATE MORE THAN ONE HOUR OF RECREATION PER DAY WITHOUT STRAINING LIMITED SECURITY RESOURCES. THESE REASONS FOR DENYING PLAINTIFF ADEQUATE EXERCISE AND RECREATION - AND ULTIMATELY SUBJECTING PLAINTIFF TO CRUEL AND UNUSUAL PUNISHMENT - CANNOT POSSIBLY BE A "REASONABLE" JUSTIFICATION FOR DEPRIVING PLAINTIFF OF ADEQUATE EXERCISE AND RECREATION UNDER THE *TURNER VS. SAFLEY* STANDARD 107 S.CT. 2254 (1987). THEREFORE, THIS COURT SHOULD GRANT PLAINTIFF SUMMARY JUDGEMENT IN HIS FAVOR FOR THIS ISSUE AND DENY DEFENDANTS' REQUEST FOR SUMMARY JUDGMENT IN THEIR FAVOR FOR THIS ISSUE.

AS TO THOSE OTHER ISSUES THAT THE *SIMS* REVIEWING COURT DEALT WITH AND FOUND AS FACT AND CONCLUDED THAT *SIMS*, WAS ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF I.E. RELIGIOUS; INCOMING MAIL AND WRITTEN RULES,

DEFENDANTS HAVE NOT BROUGHT FORTH ANY ARGUMENT [sic] OR CASE LAW DISPUTING THESE VERY ISSUES THAT PLAINTIFF ALSO PRESENTS IN HIS AMENDED COMPLAINT AND WHICH IS UNDOUBTEDLY A FACT AS AN EXTENSIVE HEARING AND TESTIMONY AND DIRECT EVIDENCE WAS HELD IN THE *SIMS* CASE AND THE COURT ACCEPTED THEM AS FACT, THEREFORE, BEING THAT PLAINTIFF ALLEGES THE SAME THING AS *SIMS* - INsofar AS THESE CLAIMS GO - THIS COURT SHOULD ALSO ACCEPT THEM AS FACT.

SHOULD THIS COURT ACCEPT THESE AFOREMENTIONED ISSUES AS FACT, PLAINTIFF, RELYING ON THE SAME CASE LAW THAT THE COURT IN *SIMS* FOUND TO BE RELEVANT FOR THESE ISSUES, REQUEST THAT THIS COURT GRANT PLAINTIFF SUMMARY JUDGMENT IN HIS FAVOR AND DENY DEFENDANTS SUMMARY JUDGMENT IN THEIR FAVOR ON THESE ISSUES.

ANOTHER DUE PROCESS VIOLATION THAT DEFENDANTS SUBJECT PLAINTIFF TO IS THE TOTALLY ARBITRARY USE OF 106 MINOR MISCONDUCTS. DEFENDANTS CLAIM THAT PLAINTIFF IS NOT ENTITLED TO DUE PROCESS UNTIL HE HAS ACCUMULATED A "COLLECTION OF UNFAVORABLE 106'S". THE DEFENDANTS' POSITION IS FRIVOLOUS.

ON ONE HAND DEFENDANTS CLAIM THAT INMATES WILL ADVANCE TO THE NEXT LEVEL IN THEIR PHASING PROGRAM IF THEY (1) ADHERE TO THE RULES OF THE FACILITY, HOUSING UNIT AND THE CORRECTIONS DIVISION. (2) DO NOT INCUR

NEW MISCONDUCT VIOLATIONS, AND (3) DEMONSTRATE SUCCESSFUL ADJUSTMENT OF BEHAVIOR AND ATTITUDE, SEE PARAGRAPH 3 PAGE 7 OF EXHIBIT "B" COMPARE EXHIBIT "E" NO. 4 PAGE 2; YET DEFENDANTS ADMIT THAT NOT UNTIL PLAINTIFF RECEIVES A COLLECTION OF MINOR 106 MISCONDUCTS WILL HE, THEN, BE GIVEN DUE PROCESS.

THUS, IN SUMMARY, AS LONG AS PLAINTIFF DOES NOT ACCUMULATE AN "UNFAVORABLE" KIND OF 106 MINOR MISCONDUCTS HE IS NOT ENTITLED TO DUE PROCESS SAFEGUARDS, BUT HE IS ENTITLED TO LONGER PUNISHMENT IN DEFENDANTS PHASING PROGRAM BECAUSE HE HAS NOT ADHERED TO THE RULES OF THE FACILITY BY PICKING UP 106 MINOR MISCONDUCTS THAT ARE LESS THEN [sic] A "COLLECTION" AND NOT IN THE UNFAVORABLE KIND" OF BRACKET. THIS IS SHEER MADNESS.

AS FOUND BY THE REVIEWING COURT IN SIMS, EXHIBIT "B", TITLE 17 §§ 17-201-6 THROUGH 17-201-20 CREATE A LIBERTY INTEREST ENTITLEMENT TO NOT BE SUBJECTED TO PUNISHMENT UNLESS FIRST GIVEN SOME FORM OF DUE PROCESS I.E. SEE, EXHIBIT "F" AT § 17-201-11(A) WHERE THE REGULATIONS CLEARLY SPELL OUT WHAT PROCEDURES "SHALL" BE TAKEN IN THE EVENT THAT AN INMATE IS ACCUSED OF COMMITTING A MINOR INFRACTION. THUS, AS PLAINTIFF WILL BE SUBJECTED TO LONGER PUNISHMENT IN DEFENDANTS PHASING PROGRAM PLAINTIFF IS DEFINITELY ENTITLED TO THE MINIMUM DUE PROCESS SAFEGUARDS

PROVIDED FOR IN § 17-201-11(A) WHEN HE FIRST IS ACCUSED OF A MINOR MISCONDUCT. NOWHERE IN ALL OF TITLE 17 DOES IT HINT TO DEFENDANTS BEING ABLE TO POSTPONE GIVING PLAINTIFF DUE PROCESS SAFEGUARDS AFTER HE HAS ACCUMULATED A "COLLECTION" OF "UNFAVORABLE" 106'S WHICH COULD TAKE WEEKS, MONTHS, OR YEARS. DEFENDANTS CANNOT ESCAPE THE ARBITRARINESS OF THEIR CONDUCT IN DEPRIVING PLAINTIFF OF PROCEDURAL DUE PROCESS WHEN PUNISHING HIM FROM ACCUMULATING MINOR MISCONDUCTS, JUSTICE DEMANDS SWIFT ATTENTION.

DEFENDANTS DO NOT DENY THAT THEY DON'T GIVE PLAINTIFF DUE PROCESS WHEN THEY SEEK TO PUNISH HIM - NOT THROUGH DISCIPLINARY SEGREGATION, BUT, THROUGH LONGER CONFINEMENT IN THEIR PHASING PROGRAM PER SE - FOR NOT ADHERING TO RULES OF THE FACILITY I.E. COMMUNICATING IN A FOREIGN LANGUAGE SEE EXHIBIT "G" AT NO. 46 ON PAGE 5 INSTEAD DEFENDANTS' JUSTIFY THEIR CONDUCT IN A MOST LUDICROUS FASHION. THUS, AS ALL RELEVANT CASE LAW EASILY FLOWS WITH PLAINTIFF'S ARGUMENT [sic] IN THIS ISSUE, HEWITT VS. HELMS, 459 U.S. 460, 466 (1983), TOUSSAINT VS. MCCARTHY, 801 F.2D 1080-1089 (9TH CIR.1986), BUT SEE WOLF VS. MCDONNELL, 448 U.S. 539, 558 (1974), PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON THIS ISSUE AS A MATTER OF LAW. THEREFORE, THIS COURT SHOULD DENY DEFENDANTS REQUEST FOR SUMMARY JUDGEMENT ON THIS ISSUE.

MECHANICAL RESTRAINTS AND STRIP SEARCHES.

BASED UPON THE OVERWHELMING EVIDENCE OF PLAINTIFFS ANTI-SOCIAL BEHAVIOR BOTH IN SOCIETY AND WHILE INCARCERATED PLAINTIFF IS FORCED TO CONCEDE THIS ISSUE TO DEFENDANTS IN SPITE OF HIS PROFOUND BELEIF [sic] THAT IF YOU TREAT INMATES LIKE ANIMALS, THEY ARE GOING TO CONTINUE TO ACT LIKE ANIMALS.

ARBITRARY INFRINGEMENT ON PLAINTIFFS RIGHT TO FREEDOM OF COMMUNICATIONS RELIGION AND EXPRESSION

DEFENDANTS CONTEND THAT THEY LEGITIMATE REASONS FOR INFRINGING UPON PLAINTIFFS FIRST AMENDMENT RIGHT OF COMMUNICATION PLAINTIFF CONTENDS THAT DEFENDANTS ARE OVER-REACHING.

WHILE DEFENDANTS MAY HAVE A LEGITIMATE ARGUMENT IN PROHIBITING PLAINTIFF FROM COMMUNICATING VIA TELEPHONE AND MAIL OR EVEN TO PRISON PERSONAL [sic] IN A FOREIGN [sic] TONGUE. BUT WHEN IT COMES TO WHAT PLAINTIFF CHOSSES [sic] TO SAY FROM HIS MOUTH, DEFENDANTS DO NOT HAVE THE AUTHORITY TO INFRIEGN [sic] UPON MY RIGHT TO SAY WHAT PLAINTIFF WANTS ESPECIALLY IN THE INSTANCES THAT WE HAVE HERE.

HERE, PLAINTIFF WHO IS A MUSLIM, WAS LEARNING [sic] HOW TO SAY HIS PRAYERS IN ARABIC. DEFENDANTS LEE AND PAAGA ORDERED PLAINTIFF AND ANOTHER INMATE TO STOP AND BOTH

PLAINTIFF AND THE OTHER INMATE REFUSED. THUS, PLAINTIFF WAS PUNISHED FOR REFUSING TO OBEY AN ORDER, LIKE WHAT IS THIS COUNTRY COMING TO? DEFENDANTS LEE AND PAAGA DIRECTLY AND DEFENDANT OKU - THE PROMULGATOR OF THIS ABSURD RULE - ARE IN CLEAR VIOLATION OF PLAINTIFF'S FIRST AMENDMENT RIGHTS.

ALTHOUGH PLAINTIFF HAS NOT BEEN ABLE TO FIND CASE LAW THAT DEALS DIRECTLY WITH THE ISSUE AT HAND, IT IS COMMON SENSE TO KNOW THAT - AT LEAS [sic] IN THIS COUNTRY - YOU DO NOT PUNISH ANYBODY FOR PRAYING IN A FORIEGN [sic] LANGUAGE - PERIOD! TIENNAMIN SQUARE IS IN CHINA, THIS IS AMERICA, AND PLAINTIFF JUST SIMPLY REFUSES TO BE INSULTED BY THIS OBVIOUS ARBITRARY ABUSE OF AUTHORITY. "REASONABLE"? DEFENDANTS "ENGLISH SPEAKING ONLY RULE IS DEFINITELY UNREASONABLE UNDER THE TURNER VS. SAFLEY, SUPRA, TEST AND PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

RETALIATION

DEFENDANTS CLAIM THAT PLAINTIFF'S RETALIATION CLAIM IS VAGUE. WHEREAS, PLAINTIFF CONTENDS THAT HIS RETALIATION CLAIM ARE VALID AND NOT VAGUE, AND AT THE SAME TIME PLAINTIFF FURTHER CONTENDS THAT HE IS AWAITING DISCOVERY WHICH WILL ASSIST HIM IN PROVING HIS CASE AND THAT THIS MATTER NEEDS TO

BE RESOLVED IN TRIAL AS IT IS UNFAIR FOR PLAINTIFF TO HAVE TO FIGHT THIS ISSUE ON SUMMARY JUDGMENT AND IS NOT BELIEVED TO BE A PROPER VEHICLE FOR SUMMARY JUDGEMENT.

REHABILITATION

PLAINTIFF CONCEDES THAT HE HAS NO RIGHT TO REHABILITATION.

SOVEREIGN IMMUNITY

DEFENDANTS CONTEND THAT THE [sic] ARE PROTECTED BY SOVEREIGN IMMUNITY. DEFENDANTS ARE MISTAKEN.

DEFENDANTS ARE SUED, IN PART, IN THEIR INDIVIDUAL CAPACITIES INsofar AS PLAINTIFF SEEKS INJUNCTIVE RELIEF AND DAMAGES. THUS, IN A CASE SUCH AS THIS THE ELEVENTH AMENDMENT DOES NOT BAR EITHER INJUNCTIVE OR DAMAGE SUITS AGAINST INDIVIDUAL OFFICIALS OR PRISON EMPLOYEES. *SEE SPICER VS. HILTON*, 618 F.2D 232, 237 (3RD CIR.1980).

FURTHERMORE, PLAINTIFF ALLEGES THAT DEFENDANTS ALSO ACTED IN CONTRARY TO POLICY AND RELEVANT LAW.

QUALIFIED IMMUNITY

DEFENDANTS CONTEND THAT THEY ARE PROTECTED BY THE DOCTRINE OF QUALIFIED IMMUNITY. PLAINTIFF CONTENDS THAT THEY ARE NOT.

UNDER THE DOCTRINE OF QUALIFIED IMMUNITY, OFFICIALS ARE LIABLE ONLY IF THEY "KNEW OR SHOULD HAVE KNOWN" THAT THEY WERE VIOLATING PLAINTIFFS CLEARLY ESTABLISHED CONSTITUTIONAL OR STATUTORY RIGHTS OF WHICH A REASONABLE PERSON WOULD HAVE KNOWN AT THE TIME THE ACTS WERE COMMITTED. *HARLOW VS. FITZGERALD*, ___ U.S. ___, 102S.C. 2727, AT 2738. PERSONS OCCUPYING "RESPECTABLE PUBLIC OFFICE" (I.E. DEFENDANT FALK) ARE EXPECTED TO HAVE KNOWLEDGE OF THE BASIC, UNQUESTIONED CONSTITUTIONAL RIGHTS OF [THEIR] CHARGES". *WOOD VS. STRICKLAND*, 420 U.S. 308, 321-22, 95 S.CT. 992 (1975) COMPARE, EXHIBIT "C" 3353-4 & 3353-6 THEREFORE, AS WERE PREVIOUSLY MADE CLEAR, EACH DEFENDANTS PARTICIPATION WHETHER DIRECTLY OR INDIRECTLY, WHERE [sic] IN CLEAR VIOLATION EITHER SEPARATELY OR IN CONJUNCTION TO OTHER STATE LAWS, RULES, REGULATIONS, STATUTES OR POLICY AND PROCEDURES. THUS, DEFENDANTS ARE NOT SHIELDED FROM LIABILITY UNDER THE DOCTRINE OF QUALIFIED IMMUNITY AND PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON THE ISSUES OF IMMUNITIES AS MATTER OF LAW.

CONSTITUTIONAL VIOLATIONS BY EACH DEFENDANT.

DEFENDANTS CLAIM THAT PLAINTIFF IS HARASSING THEM VIA THIS LAW SUIT. THIS IS FRIVOLOUS AS PLAINTIFF PRESENTS A HOST OF SERIOUS CLAIMS THAT HAVE TOTAL MERIT. DEFENDANTS

ALSO CONTEND THAT PLAINTIFF IS MISLEADING THIS COURT BY VAGUE CLAIMS. CONTRARY TO THEIR BELIEF, THOUGH IN HIS UNSKILLED AND UNLEARNED ATTEMPT TO FIGHT FOR HIS RIGHTS, PLAINTIFF MAY FROM TIME TO TIME BE VAGUE. THIS IS NOT DONE TO MISLEAD THIS COURT OR FOR ANY OTHER BAD FAITH MOTIVE. PLAINTIFF IS SIMPLY A LAYMAN WITH A 9.9 GRADE AVERAGE AND SHOULD NOT BE PERSECUTED FOR BEING SUCH.

IN ANY CASE PLAINTIFF IN HIS COMPLAINT WENT THROUGH GREAT PAINS TO NAME EACH DEFENDANT ACCORDING TO EACH ACT OR OMISION THAT THE [sic] ARE LIABLE FOR. THEREFORE, THIS SUIT SHOULD NOT BE DISMISSED ON THIS GROUNDS.

CONCLUSION

WHEREFOR [sic], AS DEMONSTRATED BY PLAINTIFF, HE IS ENTITLED TO HAVE THIS COURT GRANT HIS MOTION FOR CROSS-SUMMARY JUDGMENT IN HIS FAVOR AS A MATTER OF LAW - FOR THE ISSUES AND THAT ALL OTHER ISSUES IN HIS AMENDED COMPLAINT TO PROCEED TO TRIAL. THIS COURT SHOULD ALSO DENY DEFENDANTS MOTION FOR SUMMARY JUDGMENT ON THOSE ISSUES NOT CONCEDED [sic] BY PLAINTIFF.

DATED: HONOLULU, HAWAII, DECEMBER 26, 1989.

RESPECTFULLY SUBMITTED,

/s/ DeMont R.D. Conner,
DeMONT R.D. CONNER,
PRO SE
99-902 MOANALUA HWY.
AIEA, HAWAII 96701

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
[Caption Omitted In Printing]

AFFIDAVIT OF DeMONT R.D. CONNER

CITY AND COUNTY OF)
HONOLULU) SS.
STATE OF HAWAII)

I, DeMONT R.D. CONNER, BEING DULY SWORN DEPOSES AND SAYS:

1. THAT I AM THE PLAINTIFF IN THE ABOVE ENTITLED ACTION AND THAT I MAKE THIS AFFIDAVIT IN SUPPORT OF MY OPPOSITION TO DEFENDANTS MOTION FOR PRELIMINARY INJUNCTION WITH CROSS-MOTION FOR SUMMARY JUDGEMENT.

2. THAT I DO NOT RECEIVE ANY PERIODIC REVIEWS WHILE I AM HOUSED IN MODULE A, B, OR C.

3. THAT I AM NOT GIVEN AN OPPORTUNITY TO PARTICIPATE, IN ANY FORM, IN THE 30 DAY PERIODIC REVIEWS THAT I AM GIVEN WHILE IN PHASE ONE.

4. THAT I AM NOT GIVEN AN OPPORTUNITY TO DEFENDANT AGAINST THE FILING OF 106 MINOR MISCONDUCTS AGAINST ME.

5. THAT DEFENDANTS SAKAI, OKU AND SHOHET ARE DIRECTLY LIABLE BECAUSE THEY ARE THE ONE'S WHO PROMULGATED AND ENFORCED THE POLICIES DEPRIVING ME OF PARTIAL PARTICIPATING IN THE 30 DAY REVIEWS GIVEN TO PLAINTIFF WHILE IN PHASE ONE AND THE PRACTICES OF DENYING ME ANY REVIEW, WHILE I AM HOUSED IN MODULE A, B, AND C.

5 [sic]. THAT I AM SUBJECTED TO ONLY ONE HOUR OF EXERCISE AND RECREATION PER DAY FIVE DAYS A WEEK EXCLUDING WEEK ENDS WHILE CONTAINED IN PUNITIVE ISULATION [sic].

6. THAT DEFENDANTS OKU AND SHOHET ARE LIABLE FOR DEPRIVING ME OF ADEQUATE EXERCISE AND RECREATION WHEN THEY SUBJECT ME TO 22 HOURS OF PUNITIVE ISOLATION.

7. THAT I AM DENIED TO RECEIVE RELIGIOUS MATERIALS AND LITERATURE, MEDITATION BY DEFENDANTS OKU AND SHOHET.

8. THAT I AM DENIED TO RECEIVE ADEQUATE RELIGIOUS COUNSELING FROM MY RELIGIOUS LEADER BY DEFENDANTS OKU AND SHOHET, E.G., ONLY ONCE VERY THREE WEEKS AM I ALLOWED TO SEE MY RELIGIOUS LEADER.

9. THAT DEFENDANT OKU ALLOWS CHRISTIAN INMATES TO SEE THEIR RELIGIOUS LEADER TO COME INTO THE HOUSING UNITS IN ALL MODULES ONCE A WEEK TO DISTRIBUTE RELIGIOUS LITERATURE TO ANY INMATE WHO WANTS IT, YET MUSLIM INMATES AND ANY PROSPECTIVE INMATE WHO MAY WANT TO CONVERT TO ISLAM ARE DENIED TO HAVE OUR RELIGIOUS LEADER TO COME INTO THE HOUSING UNITS TO SHARE LITERATURE OF ISLAM.

10. THAT PLAINTIFF IS DENIED BY DEFENDANTS OKU AND SHOHET TO RECEIVE NEWSPAPER ARTICLES, BROCHURES, BOOKS AND MAGAZINES THROUGH THE MAIL AND I AM NOT NOTIFIED AND GIVEN AN OPPORTUNITY TO CONTEST THE MAIL CONSUM [sic] DECISION TO REFUSE ME TO RECEIVE ITEMS LISTED ABOVE THROUGH THE MAIL.

11. THAT DEFENDANTS OKU AND SAKAI CAUSED ME TO BE PUNISHED FOR PRAYING IN ARABIC BY DEFENDANTS PAAGA AND LEE, BY PROMULGATING AN ENGLISH SPEAKING ONLY RULE.

12. THAT I AM NOT ABLE TO FULLY DEFEND A MOTION FOR SUMMARY JUDGEMENT ON THE ISSUE OF RETALIATION AS I HAVE NOT BEEN ABLE TO RECEIVE ANY DISCOVERY THAT COULD LEND SUPPORT TO MY CLAIM OF RETALIATION.

13. THAT BASED ON INFORMATION AND BELIEF, THE S.M.C.P. IS A RULE THAT GOVERNS ALL OF HALAWA HIGH SECURITY FACILITY AS NO MATTER WHERE I AM IN THIS FACILITY I AM SUBJECT TO CONFORM TO THE RULES OF THE SEGREGATION AND MAXIMUM CONTROL PROGRAM (S.M.C.P.).

14. THAT BASED ON INFORMATION AND BELIEF, DEFENDANT FALK HAS TACITLY APPROVED OF ALL THE DEPRIVATIONS THAT I HAVE DISCRIBED [sic] ABOVE.

15. THAT EXHIBIT "A" IS A TRUE AND CORRECT COPY OF THE POLICIES AND PROCEDURES OF THE S.M.C.P.

16. THAT EXHIBIT "B" IS A TRUE AND CORRECT COPY OF THE REPORT AND RECOMMENDATION FILED BY MAGISTRATE CONKLIN IN *SIMS VS. FALK, ET AL.*, CIVIL NO. 88-034 DAE ON SEPTEMBER 23, 1989 (U.S.D.C. D. HAW.) THAT WAS ADOPTED AS MODIFIED BY JUDGE DAVID A. EZRA ON JANUARY 4, 1990.

17. THAT EXHIBIT "C" IS A TRUE AND CORRECT COPY OF HAWAII REVISED STATUTES §§ 353-3, 353-4; . . . AND 35306.

18. THAT EXHIBIT "D" IS A TRUE AND CORRECT COPY OF TITLE 17 ADMINISTRATIVE RULES OF CORRECTIONS DIVISION § 17-200-1(2).

19. THAT EXHIBIT "E" IS A TRUE AND CORRECT COPY OF AN AFFIDAVIT OF DEFENDANT SHOHEI FILED IN *SMITH, ET AL., VS. SAKAI, ET AL.*, CIVIL NO. 86-0156 (U.S.D.C., D. HAW.).

20. THAT EXHIBIT "F" IS A TRUE AND CORRECT COPY OF TITLE 17 §§ 17-201-4 THROUGH 17-201-20.

21 [sic]. THAT EXHIBIT "G" IS A TRUE AND CORRECT COPY OF THE S.M.C.P. INMATE GUIDELINES FOR GENERAL POPULATION OF MODULE "A", "B", AND "C".

21. THAT DUE TO THE MASS DEPRIVATIONS THAT I HAVE BEEN SUBJECTED TO AS DESCRIBED ABOVE - BUT NOT ONLY LIMITED TO THESE DEPRIVATIONS - I HAVE HAD NO RESPECT FOR PRISON AUTHORITIES, I HAVE BECOME QUICK TEMPERED, EVEN MORE VIOLENT. I KICK ON DOORS, AM VERBALLY ABUSIVE, CRY, EXPERIENCE HIGH ANXIETY, CRAMPS AND ACCUMULATE A COLLECTION OF MISCONDUCTS.

22. THAT WHILE IN MODULE B AND C MY BEHAVIOR IMPROVES DRAMATICALLY BECAUSE NOW I FEEL THAT I HAVE A BETTER CHANCE TO SHOW MY WORTH BY PARTICIPATING IN EDUCATIONAL AND/OR VOCATIONAL PROGRAMING, WHEREAS IN MODULES AND PHASE ONE I DO POORER BECAUSE I AM NOT GIVEN ANY INCENTIVE TO DO BETTER.

I AM NOT GIVEN ANY IDEA OF HOW LONG I WILL BE CONFINED IN THIS PHASES.

FURTHER AFFIANT SAYETH NAUGHT.

DATED: HONOLULU, HAWAII, DECEMBER 26, 1989.

RESPECTFULLY SUBMITTED,

/s/ DeMont R.D. Connor
DeMONT R.D. CONNOR,
PRO SE
97-902 MOANALUA HWY.
AIEA, HAWAII 96101

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. SIGNED THIS 26TH DAY OF DECEMBER, 1989.

/s/ DeMont R.D. Conner
DeMONT R.D. CONNER,
PRO SE

EXHIBIT "A"

POLICIES AND PROCEDURES SEGREGATION AND MAXIMUM CUSTODY PROGRAM HALAWA HIGH SECURITY FACILITY INTRODUCTION

The Special Holding Unit at the Halawa High Security Facility (HHSF) has the capacity to house 12 inmates. Primarily intended for disciplinary segregation, it has also been used to house maximum custody inmates considered to need closer control and greater supervision than can be provided in Module A.

The Segregation and Maximum Custody (SMC) Program is based upon a system of behavior modification known as

operant conditioning. This means that inmates will be either positively or negatively reinforced as a consequence of specific behaviors. Inmates who demonstrate behaviors viewed as positive will be rewarded through forward movement in the program, while behavior seen as negative will result in setbacks of various types and additional time in the SMC program. The primary vehicle for regulating movement through the program will be sequential phasing.

The SMC Program will consist of two sequential phases. The first phase will include housing in Special Holding, while the second phase will be based in Module A.

PHASE I MAXIMUM CONTROL PROGRAM

Selection Criteria

Inmates classified "Max" custody who are confined to Special Holding for disciplinary segregation will move to Phase I upon completion of that period. If an inmate commits a new misconduct for which he receives additional disciplinary segregation time, he will automatically revert to disciplinary segregation status as of the date of approval by the Facility Administrator.

Under unusual and compelling circumstances, the Program Committee may consider inmates for programming to the Maximum Control Program who are exceptions to the normal selection criteria. Circumstances in which such action may be taken include, but are not limited to, protective custody situations for which security in a residency module is not considered adequate,

and in extremely severe management or security problems where the safety, security or good government of the facility is compromised by less secure housing. The Program Committee will not assign Phase I status to an inmate who is not housed in disciplinary segregation at the time of the program committee action without approval of the Program Control Administrator.

Phase I Program

Phase I is a program status separate and distinct from disciplinary segregation. The length of time an inmate will spend in Phase I will vary depending upon his record of prior misconducts (if any), behavioral/attitudinal adjustment, and any other considerations which the Program Committee may consider to be relevant. Generally, inmates will be on Phase I status for between 60-120 days, but this time may be increased or decreased by the Program Committee to conform with the individual inmate's programmatic needs.

Upon completion of Phase I, inmates will normally move to Phase II, in accordance with programmatic needs established by the Program Committee. The principal criteria for evaluating an inmate's readiness to move to Phase II are:

1. Ability to abide consistently over time by all rules and regulations.
2. Absence of new misconducts.
3. Evidence of satisfactory, stable behavioral/attitudinal adjustment.

Judgements concerning an inmate's progress will be made by the Program Committee in consultation with the inmate's social worker, security personnel, and any other staff whom the Program Committee, in its discretion, chooses to consult.

Inmates programmed to Phase I will be housed in Special Holding.

Program Committee Reviews

Phase I inmates will be reviewed monthly by the Program Committee. Reviews more frequently than monthly will be made in exceptional circumstances, as determined by the Program Committee.

Administrative Review

The Program Control Administrator may terminate an inmate's Phase I status and release him to housing areas other than disciplinary segregation, Phase I or Phase II - either on the recommendation of the Program Committee or by administrative action where unusual or compelling circumstances indicate. He may also advance an inmate to Phase II status. This may not necessarily require a change in custody classification.

EXHIBIT D

Halawa High Security Facility

INMATE GUIDELINES

Segregation and Maximum Control Program
PHASE I

Inmates are subject to all State of Hawaii laws, Corrections Division policies (handbook) and HHSF policies and procedures. Any deviation from these guidelines may be subject to a program hearing, disciplinary action/criminal charges.

The following are the guidelines for inmates programmed to Phase I of HHSF:

SELF-REPRESENTATION

1. Inmates shall not be allowed to govern or order another inmate.
2. There will be no group representation. All inmates will be self-represented.

MOVEMENTS

3. All cell doors shall remain locked at all times unless authorized or permitted to be opened.
4. Only one inmate at a time shall be allowed out of his cell when authorized or permitted. While out of his cell, he shall go directly to and from his authorized destination and not loiter, visit with other inmates, or in any way delay his return to his cell.
5. Whenever an inmate is authorized to be moved out of Special Holding, that inmate shall be leg-ironed and waist-chained at all times during his absence.

6. All inmates in Special Holding shall be strip-searched upon leaving and returning to Special Holding.
7. Inmates must be properly dressed in HHSF uniform and footwear must be worn at all times when leaving Special Holding, except for legitimate reasons. (Exceptions: Uniforms do not have to be worn at recreation time and upon being escorted to court jury trials.)

SPECIAL HOLDING STANDARDS

8. No defacing of walls, windows, fixtures, and equipment.
9. There will be no obstruction to the see-through glass (window) on the cell door, light fixtures, and vents.
10. Stringing of clothes lines shall not be permitted.
11. Inmates shall not use abusive or obscene language towards any staff member.
12. All dayroom lights and all cell lights will be turned off at 10:00 p.m. All lights will be turned back on at 5:30 a.m.
13. Cellars must be clean, orderly, and ready for inspection at all times.
14. Razors will be available for use daily as scheduled. Exceptions will be made for those inmates scheduled for official appearances. (i.e. Court, parole hearings, etc.)
15. Television privileges shall not be permitted.

16. No item shall be given to a staff member to be passed to another inmate.
17. Blankets, sheets, pillows, pillow cases, laundry bags and mattresses shall be kept in the inmate's cell.
18. Upon any lockdown period, any personal property left in the dayroom and shower areas will be confiscated.
19. Inmates shall not pass or receive any items under their cell door to/from another inmate under any circumstance.
20. Cardbord boxes, plastic containers, plastic bags, glass containers, cans, or any implement of storage shall not be permitted or stored in an inmate's cell. (Exception: Dentist/Unit Team approved containers for dentures.)
21. Jewelry and watches of any type shall not be permitted.
22. Radios, tape recorders, and all electronic entertaining devices shall not be permitted.
23. Instruments of music shall not be permitted.
24. No inmate shall have money in his possession. All money will be considered contraband and subject to confiscation. There will be no transferring of money from one HHSF inmate account to another.
25. The toilet shall not be used as a disposal of discarded authorized items. Except for toilet paper, no authorized item for retention shall be flushed through the toilet.

MEALS

26. After each meal, all trays will be put in an orderly fashion outside of the cell. *No food will be stored in the cell.*

AUTHORIZED ITEMS FOR RETENTION

27. Except for the items listed below, nothing else is permitted for retention by the inmate in his cell. All excess personal items will be kept in the inmate's property storage area until arrangements by the inmate can be made for it to be sent out of the facility (via i.e. family, friends, or mailed out).
 - a. One tube toothpaste (HHSF issued or through inside store order only)
 - b. One toothbrush
 - c. One bar of soap (HHSF issued)
 - d. One roll toilet paper
 - e. two towels and two washcloths
 - f. one mattress
 - g. one blanket
 - h. one Bible or religious publication
 - *i. four sheets of writing paper - with or without lines, i.e. typing paper (not to exceed 8¹/₂" x 11") (HHSF issued)
 - *j. one tablet of writing paper - with or without lines, i.e. typing paper (not to exceed 8¹/₂" x 11") (through inside store order only)
 - k. one pencil (no pens)

- *l. two letter size envelopes (HHSF issued)
- *m. one package of 75 letter size envelopes (through inside store order only and kept in the control station, issued upon written request)
- n. one pair slippers
- o. one pair athletic shoes
- p. four issued T-shirts (white)
- q. four undershots [sic]
- r. four pairs socks (white athletic socks)
- s. one blue sweatshirt (through store order only)
- t. Two pants (HHSF uniforms)
- u. Two shorts (athletic type, solid color, no pockets)
- v. one comb (HHSF approved)
- w. one *Inmate Handbook* (given upon request)
- x. one legal book publication [sic] or transcript directly related to your case
- y. stamps (limited to one book)
- z. laundry bag (HHSF issued)
- aa. four incoming correspondence/letters

Authorized items for retention, as herein listed, shall not be altered or used other than the way it was intended to be used. All store ordered items shall be purchased on a trade-for-trade basis.

- 28. *Court clothes* will be permitted but will be kept in the property room. Court clothes will consist of one (1) set of dress clothes, one (1) pair of dress shoes, and one (1) pair of dress socks. All subsequent court clothes will be accepted on a trade-for-trade basis.
- 29. All HHSF-issued property is the inmate's responsibility. Any damage, loss, etc., to issued property may result in a misconduct report being filed against the inmate assigned the property which may include his having to pay for the property.

PROHIBITED ITEMS

- 30. Anything not specifically authorized for possession, conveyance or introduction onto the Halawa High Security Facility compound by the facility administrator shall be considered contraband. Inmates violating this section shall be subject to appropriate disciplinary sanctions which may include criminal charges.
- 31. Cigars, cigarettes, tobacco in any form or derivative, and/or smoking paraphernalia shall not be permitted. Inmates shall not request for cigarettes from staff.

COMMUNICATION

- 32. All requests will be in writing except for emergency situations.
- 33. Except in cases of medical emergency, all requests for medical attention must be in writing. No inmate shall possess any medication.

34. ACOs will accept requests from the inmates for toilet paper, soap, and sharpening of pencils only once daily in the morning.

35. Inmates shall communicate in the English language only; including telephone calls, visits and letters.

Exception: A written request must be submitted and approved by the Unit Team for an inmate to speak a foreign language to a non-English speaking person which includes immediate family members.

36. *Official Visits* as defined in the *Inmate Handbook*, Section 17-203-2, (i.e. legal counsel, ombudsman, etc.) shall be permitted at any reasonable hour in accordance with applicable division and facility policies. Official visitors are encouraged to make prior appointments with the facility.

Personal Visits privileges shall be limited to two (2) one-hour non-contact visits per month as scheduled, except Saturday, Sundays, and holidays. Phone #1 shall be utilized for non-contract visits unless otherwise instructed by staff. Immediate family may visit during personal visiting periods. Immediate family shall be defined as wife, mother, father, sister, brother, daughter, and son - whether natural or hanai. Non-immediate family members and friends may be permitted to visit subject to the following conditions:

Requests for such visits must be made in writing by the Phase I inmate to the

social worker no less than three working days prior to the date of the proposed visit. The request must be approved by the Unit Manager before it may be scheduled. Once the visitor has been approved by the Unit Manager, he or she may visit the same Phase I inmate on subsequent occasions without having to be approved in this manner prior to each visit.

Denial of such visits will be for cause. The reasons for denial will be furnished in writing to the inmate. Where confidential information is involved, a general summary will be provided to the inmate. Denial of visits under this provision will be for the safety, security, and good government of the facility only. The prospective visitor's criminal record, if any, will be considered. Non-immediate family and friend visitors will be permitted to visit only one Phase I inmate.

Special Immediate Family Visits will be limited to off-island immediate family only. If they are unable to visit during regular visits as scheduled, they may request ahead of time for a special visit. If approved, the special visit will be for one (1) hour duration on a weekday during business hours. Airline tickets must be presented as verification of off-island status and the actual dates of stay on Oahu.

CORRESPONDENCE

37. Incoming or outgoing mail to and from inmates or wards will be inspected and

read. Privileged mail as described by the *Inmate Handbook* should normally be inspected for contraband in the presence of the inmate/ward.

38. There is no restriction on *incoming personal letters* but inmates are allowed to keep only four (4) personal letters in their possession. Only personal letters may be received by inmates. All other items such as photographs, newspaper clippings, crossword puzzles, brochures, etc., will automatically be placed into his property.
- *39. *Outgoing personal correspondence* will not be limited. Each letter will be no more than two sheets of paper – no larger than 8-1/2" x 11".
- *40. Inmates will be responsible for the purchase of writing materials and are only purchaseable through the inside store order.
- *41. All outgoing mail will be picked up from the cells, daily at lights out; 10:00 p.m.

LAUNDRY

42. Laundry services are provided twice a week as scheduled.
43. Blankets will be exchanged once a month as scheduled.
44. All clothing will be marked by name to assure proper return after laundry days.

TELEPHONE

45. *Official* telephone calls will be limited to one (1) call per day, as scheduled and limited to five (5) minutes per call, except

Saturdays, Sundays, and holidays. Telephone calls to and from the ombudsman shall be permitted at any reasonable hour without delay.

Personal telephone calls will be limited to one (1) scheduled personal telephone call per month, not to exceed ten (10) minutes.

STORE ORDERS

46. Inmates with available funds shall purchase, upon approval from the Special Holding ACO IV, through the inmate commissary *only* these items: toothpaste, toothbrush, comb, slippers, sweatshirt and stamps. These items shall be purchased *only* as they are needed and on a trade-for-trade basis. No other items are allowed to be purchased.
47. For medical reasons, items such as soap may be purchased from the inmate commissary, upon prior written approval from the facility physician. Inmates are responsible for purchasing these items with their available funds and *only* as the need for these items arise.

EXERCISE PERIOD

48. Inmates shall be allowed to have one 60-minutes indoor or outdoor exercise period per day as scheduled excluding weekends and holidays, unless compelling security or safety reasons dictate otherwise.

SHOWERS

49. Inmates shall be scheduled daily showers for a reasonable period of time not to

exceed ten (10) minutes, unless compelling security or safety reasons dictate otherwise.

INCOMING/OUTGOING PERSONAL ITEMS

50. Inmate transactions regarding trade-for-trade court clothes may be brought in via family and friends on weekdays, except holidays, between 8:00 a.m. and 1:30 p.m. only. (Note: No books or magazines will be accepted.)

MONEY

51. *Incoming money* may be accepted through the mail in the form of money orders or cashier's check only. Incoming money (money orders, cashier's check, and cash) may be brought to the facility between 8:00 a.m. and 4:00 p.m. *Personal checks will not be accepted at any time.*
52. *Outgoing money* – Inmates may make written requests to send their "spendable account" money out. The inmate is to state to whom the money is going, the amount, and the reason for the withdrawal. Upon approval by the Unit Team, a check will be given to the inmate's respective Case Manager for appropriate disposition.

These guidelines of the Segregation and Maximum Control Program (SMCP), Phase I, may be revised, modified, or amended without notice from time to time, upon approval of the Corrections Manager.

Effective date of SMCP Phase I guidelines: Upon approval.

APPROVED:

/s/ William Oku
William Oku,
 Corrections Manager II
 9/24/86
Date

*Denotes revisions on 9/24/86.

EXHIBIT "E"

CORINNE K. A. WATANABE
Attorney General
State of Hawaii

LILA B. LeDUC
Deputy Attorney General
State Capitol
Honolulu, Hawaii 96813
Telephone: 548-4740

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

TERRY SMITH,)	Civil No. 86-0156
SCHUYLER DeCAIRES,)	
CLEVELAND KING,)	AFFIDAVIT OF
)	LAURENCE S. SHOHEI;
Plaintiffs,)	EXHIBITS A and B
)	
vs.)	
)	
TED SAKAI, et al.,)	
)	
Defendants.)	
_____)	

AFFIDAVIT OF LAURENCE S. SHOHEI

STATE OF HAWAII)
) SS:
CITY AND COUNTY OF)
HONOLULU)

LAURENCE S. SHOHEI, being first duly sworn, on
oath deposes and says that:

1. He is employed by the State of Hawaii as the Program Control Administrator for Halawa High Security Facility (HHSF) and has been so employed since April 1, 1981. In the absence of administrator William Oku, he is usually the acting Administrator for the facility;
2. Since 1981, HHSF has served as the high or maximum security facility for the State of Hawaii;
3. In 1981, he was involved in the development and implementation of the Segregation and Maximum Control Program (SMCP);
4. The program is geared to the security needs of a high security facility and consists of a phasing process whereby inmates demonstrating satisfactory adjustment move up to the next phase and gain greater privileges with each movement. The inmate's length of stay is not fixed in a phase; his progress is based upon his behavior which determines how rapidly or slowly he moves through the system. Some inmates leave phase one well before their first 30-day review due to good behavior;
5. This gradual process allows for closer monitoring and more accurate assessments of an inmate's adjustment and readiness for the next phase;
6. The program and its policies and procedures developed out of the concern of Corrections Division (CD), the Ombudsman's Office, and other departments that specific and clearly defined rules be in place for disciplinary segregation and the sequential phasing following completion of disciplinary segregation time;
7. The program went into effect in August 1981, and to his knowledge has not been formally challenged by

administrative grievance or lawsuit, apart from the challenge from plaintiffs herein;

8. The program and its policies and procedures were authorized by HHSF Administrator Oku prior to implementation and although not mandated by state law or rule, were approved on August 24, 1981, by Edith Wilhelm, then Corrections Division Assistant Administrator for Michael Kakekasako, then Administrator of the Corrections Division, Department of Social Services and Housing;

9. No HHSF inmates have physical access to the library. The general population inmates have access to the librarian. Inmates may make written requests to the librarian for pending cases or if they are contemplating filing an action;

10. Plaintiffs, who are in the special holding unit, are permitted one legal item at a time in their cell; the item may then be exchanged for a different item; they are not permitted reading material, other than a bible or its equivalent, because of the physical configuration of the cell area where they are located which would permit the unauthorized shuffling of items from cell to cell due to a recess in the floor of the connecting corridor;

11. Attorneys have virtually unrestricted access to the facility, and they are always accommodated within reasonable limits; arrangements may be made for visitation until 9:00 p.m. Monday to Friday, and weekends as well;

12. All HHSF inmates, regardless of segregation status, are permitted one official telephone call per day for

five minutes to an attorney, a government official, the ACLU, the Ombudsman, or the like. If more time is needed, the attorney or other individual may call the inmate back and speak as long as necessary;

13. All HHSF inmates, regardless of segregation status, are subject to the same outgoing mail contraband search policy. An inmate hands his letter to staff in his housing area, unsealed. The staff member looks into the envelope merely to determine that it contains only paper with writing. It is then sealed in the inmate's presence and forwarded to the mail censor who logs the item prior to mailing. In the case of Terry Smith, his official mail is skimmed initially to verify if it is indeed official mail because he recently abused his official mail privileges by mailing an official letter to an Alaskan courthouse for reforwarding to a friend. The letter contained several criminal proposals, and was returned to HHSF by the Alaska court clerk's office;

14. Inmates in Special Holding are not allowed to possess a pen but are allowed a pencil within their cells. Due to the idle time possessed by segregation inmates, they have in the past used pens for self-mutilation and tattooing [sic] which has required medical treatment. For pending legal actions or requirements, provision is made for ink to be used;

15. Inmates in Special Holding may have four pieces of free writing paper per day, but special needs, e.g. legal cases, are accommodated. Security and safety issues have arisen from large allotments of paper, e.g. fires and clogging of plumbing. Typewriters are not available to any inmate in HHSF. Free envelopes are available

to segregation inmates, two per day, for official [sic] correspondence. Additional free envelopes are provided for legitimate need. All inmates are provided free notary service which is scheduled for them pursuant to a proper written request;

16. No HHSF inmate is provided xeroxing services, (apart from xeroxed items supplied by librarian to him) but in the past, an urgent need was accommodated for an inmate. Inmates may mail out for copying any item they wish to have xeroxed;

17. Inmates in disciplinary segregation are permitted to send two pieces of personal mail per day. They are permitted one one-half hour visit per month from immediate family;

18. Inmates in phase 1 have no restriction on the amount of personal mail they send. They are permitted visits from friends as well as family, and may place a personal telephone call each month for up to ten minutes;

19. Special Holding inmates are not permitted smoking materials or cosmetics. They are allowed a daily shower of up to ten minutes and are provided necessary toiletries and grooming items;

20. Disciplinary segregation time may be imposed concurrently or consecutively to any disciplinary segregation time being served, i.e. new misconducts can result in consecutive punitive terms. Upon the completion of disciplinary segregation sanctions of more than four hours, a maximum custody inmate will enter Phase 1. Inmates with lower custody classifications will return to their original housing area. Phase 1 inmates who have

not progressed out within thirty days receive monthly review;

21. Disciplinary and administrative segregation time is imposed through procedures which comport with due process, and in accordance with Title 17, Administrative Rules of the Corrections Division, Subchapters 2, 3, and 4. A true copy of these subchapters is attached hereto as Exhibit A;

22. Programming decisions, regarding classification, assignments, housing, worklines, education, and the like comport with due process requirements. Program committee hearings are held on these matters where there is any potential deprivation. The committee normally consists of three people, the inmate is allowed to appear with counsel substitute, and reasonable cross examination and discovery are permitted. The hearing and attendant procedures are in accordance with Title 17, Administrative Rules of the Corrections Division, Subsection 1. A true copy of this subsection is attached hereto as Exhibit B; Where there is any potential for deprivation, inmates are present at a noticed hearing; in cases where no deprivation is at issue, the matter is handled informally;

Further Affiant sayeth naught.

/s/ Laurence S. Shohet
LAURENCE S. SHOHE

Subscribed and sworn to before me
this 8th day of August 1986.

/s/ _____
Notary public, State of Hawaii
My commission expires: 6/8/90

[Exhibits Hereto Deleted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

DECLARATION OF JANICE NEILSON

(Filed Sept. 24, 1990)

I, JANICE NEILSON, under penalty of perjury do hereby declare that:

1. I am the Librarian for the Halawa Correctional Facility and have been since February of 1990. I oversee the operations for both the Medium Security Facility Law Library and the High Security Facility Law Library.

2. For the month of June 1990, Plaintiff was scheduled to use the law library for three hours on June 6, on June 21, on June 25, and on June 27. He was not scheduled to use the law library on the week of June 11th because a request was not timely received. He did not attend on June 25 and June 27 because he was moved to the Special Holding Unit.

3. Inmates at both the High Security and the Medium Security Facility are required to make a written request in advance to attend the law library. They are given a minimum of three hours of access a week and are allowed an additional three hours if [a] they have a docketed court case and/or [b] space is available. Plaintiff is normally scheduled for six hours a week because he has a docketed court case. The schedule will list every inmate who is to use the law library. This schedule reflects two other standard procedures, that inmates from different modules or housing units are not mixed and there is a limit on the number of inmates who can attend per session.

In order for the inmate's name to appear on that week's schedule, his request to use the law library must be received the Wednesday prior to that particular week. Copies of that schedule are then sent to security personnel and the individuals who enable the inmates to be moved to and from the law library. The schedules and the requests are regularly made in the operation of the library. All these documents are filed and they are official records of the Department of Public Safety.

We did not receive a request from Plaintiff during the week of June 6. If we had, however, he would have been scheduled. We did receive two requests on June 13. Attached hereto as Exhibits B and C are true and correct copies of the original requests kept in the library's files. Because they were received on the 13th, it was too late to schedule Plaintiff for the week of June 11.

Attached hereto as Exhibits D, E, and F are, respectively, the High Security Facility's law library schedules for the week of June 4, June 18 and June 25th. These are true and correct copies of originals kept in the library's files.

4. If an inmate is moved to the Special Holding Unit after the schedule is made and circulated, he will not attend the law library as scheduled. The reasons for this include the fact that it is too late to redraft the schedule, the inmate cannot attend as scheduled because of the prohibition against mixing inmates, and frequently the maximum number of inmates allowed to attend for that module has already been reached. In order to accommodate the recent arrival, someone else would have to be bumped off the list.

Because Plaintiff was moved to the Special Holding Unit, he did not attend the law library as scheduled on the 25th and 27th of June.

5. The law library at both the High and Medium Security Facilities are required to be staffed by a librarian or a library assistant. Adult Corrections Officers (ACO) do not and have not been used to keep the law library open. As I understand, there is a shortage of ACO's and requiring an ACO to staff the law library would mean another post in the facility would not be staffed by an ACO. ACO's do bring prisoners to and from the law library and one does usually sit in the learning center room at the High Security Facility when the law library is open. The ACO in the learning center, however, monitors the inmates in the learning center. He can see into the law library but he is not and never has been assigned to monitor the law library. That is the librarian's duty.

There has been only one exception to this rule and that occurred on the 21st of June where Cinda Sandin arranged for Plaintiff to use the law library with no staff present.

6. On May 31, 1990, the law librarian for the High Security Facility quit without notice. He left on a medical emergency. Because he left unexpectedly, there was no opportunity to hire a replacement librarian prior to his departure.

7. The High Security Facility law library was kept open by librarians and library staff borrowed from other facilities. The High Security Facility's law library hours were curtailed in June. On July 12, the law library resumed its normal hours of operation and is kept open

by people on emergency hire status and other personnel. I have reviewed the request and schedules since that date and note that Plaintiff has been scheduled for six hours a week in the law library when he requests.

8. We have been in the process of hiring a law librarian for the position at the High Security Facility. That position is similar to mine in that it is a civil service position. Before persons can be hired for a civil service position, they must go through a time consuming process which includes tests, security clearance, and checks into their backgrounds.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, Sept. 20, 1990.

/s/ Janice Neilson
JANICE NEILSON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

DECLARATION OF SHELLY NOBRIGA

I, SHELLY NOBRIGA, under penalty of perjury do hereby declare that:

1. I am the Acting Unit Team Manager for the Halawa High Security Facility. I have served in this capacity since February 1990 and have been employed by the Halawa Correctional Facility since December 1988.

2. As part of my duties, I have access to all the inmates' files who are housed in these particular units at the High Security Facility. I also handle a portion of the inmate request forms and have access to the file in which inmates' grievances are kept. The documents kept in the inmates' files, the inmate request form and the inmate grievances are made in the regular course of operations at the Halawa High Security Facility. They are prepared by individuals who are under a duty to tell the truth. I have seen and filed documents in every inmate's file who has been incarcerated at the Halawa High Security Facility since September 1989.

2. I am fully aware of Plaintiff's court order. As part of that order I understand he is to be given a tablet of paper, though the cost of that tablet is to be debited in his account, and be given access to a pen when he requests until 10:00 p.m. Plaintiff is supposed to procure these items from the Facility's commissary. To obtain items he must submit a store order form. These forms are picked up once a week.

If he experiences any problems with obtaining a pen or paper, he usually submits a written request to me. A tablet of inmate request forms are kept in each module. The requests are picked up once a day by an Adult Corrections Officer before breakfast, Monday through Friday. All the requests, except for those for attorney phone calls, toiletry items, laundry and requests to speak with the module sergeant are handled by me. I have gone through the file which contains his requests. He filed 11 requests in May and 23 requests in June. Only one of those was for a pen and paper. Attached hereto as Exhibit G is a copy of that request, the original of which is an

official record of the Department of Public Safety. He made the request on the 21st of May, and he was given pen and paper on the 22nd. It was for one pen and one tablet.

I have gone through the grievance file and found that Plaintiff filed two grievances in May and one grievance in June. None of those grievances mentioned either a pen or paper.

Attached hereto as Exhibits H and I are, respectively true and correct copies of the misconduct prepared on June 21, 1990 and the Memorandum sent to the District Court regarding the shortage of staff from the library. The originals are official records of the Department of Public Safety.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, September 20, 1990.

/s/ Shelley Nobriga
Shelley Nobriga

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF HAWAII
 [Caption Omitted In Printing]
DECLARATION OF CINDA SANDIN

I, CINDA SANDIN, under penalty of perjury do hereby declare that:

1. I am the Residency Section Supervisor for the Halawa High Security Facility and have been since September [sic] 16, 1989. I have been employed by the Department of Public Safety since March 14, 1983.

2. Because of a shortage of library staff I arranged to have Plaintiff taken to the law library on June 21, 1990, even though no staff would be present in the law library. On that day, however, Plaintiff was moved to the Special Holding Unit because he was suspected of violating prison rules.

3. As a matter of procedure, when inmates are moved to the Special Holding Unit, they do not attend the programs they are scheduled for. This is partly due to the incident which caused the move and the logistics of moving inmates and their property.

Also, inmates housed in one module or unit are not mixed in central gathering areas such as the law library with inmates from other modules. This inhibits the flow of information and contraband between modules. Controlling the flow of contraband is a never-ending problem, recently a library book was used to smuggle thirteen cigarettes into the Special Holding Unit.

Further, inmates are segregated to prevent inmate violence. Inmates do hold grudges and will take revenge. Strictly controlling inmate housing and preventing inter-unit mingling reduces prison violence.

In order for a particular inmate to be rescheduled for his programs he must submit a written request for placement on the next schedule. If the next week's schedule has already been prepared however, he will have to wait for the following week.

4. Even though Plaintiff was moved after the law library schedule was made for the week of June 25th, he was taken to the law library that week. This was due to the fact that he had a court order commanding that he be given law library time.

5. I have provided Plaintiff with pen and paper on numerous occasions though he is supposed to get these items from the commissary via store orders. I keep a supply of pens and paper in my office just in case the commissary does not supply Plaintiff with pen and paper.

Plaintiff has informed me in the past that he needs pen and paper by either writing grievances, requests or confidential letters. He frequently writes letters complaining about virtually every aspect of the prison.

I was not aware of any problems Plaintiff may have had in the month of May. He did not demand a pen or paper in a request, grievance or letter for that month. If he had, I would have provided him with these items.

Regular operations of the Special Holding Unit requires a log of inmate movements to be kept. This log is kept by individuals under a duty to report truthfully and

accurately. It is prepared soon after the events creating the entry occur. Attached hereto as Exhibit J is a copy of that log for June 21st, 1990. This is a true and correct copy, the original of which is an official record of the Department of Public Safety.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, September 21, 1990.

/s/ Cinda Sandin
CINDA SANDIN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

DECLARATION OF DAVIS HO

I, DAVIS HO, under penalty of perjury do hereby declare that:

1. I have been employed as the commissary clerk for the Halawa Corectional [sic] Facility for approximately three years.

2. Inmates can submit store orders on a weekly basis. If they have sufficient funds and are allowed to purchase the requested items, the items and the store orders are sent to the inmate. The inmate is required to sign at the bottom of the form acknowledging receipt of the items. The signed store order forms are returned to the commissary and filed.

3. Attached hereto as Exhibit A are DeMont Conner's store order forms for pen and paper from January 1990 to the end of June 1990. (The store order forms for the weeks of May 14, May 21 and May 28 cannot be located) These are true and correct copies.

4. Conner's store orders for pen and paper were routinely filled until the first week of May, 1990. Through oversight or inadvertence his orders were not filled for the next four weeks. In early June, I was alerted by someone at the Halawa High Security Facility that DeMont Conner had not been receiving a pen and paper. I promptly filled the next store order for pen and paper, which Conner acknowledges receipt on June 14, 1990. his store orders have continued to be filled.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, September 21st, 1990.

/s/ Davis Ho
DAVIS HO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

DECLARATION OF CARL ZUTTERMEISTER

I, CARL ZUTTERMEISTER, do hereby declare under the penalty of perjury that:

1. I am employed as a Library Technician at the Halawa Correctional Facility and have been since April 23, 1990.

2. I was the staff member assigned to the law library at the Halawa High Security Facility on June 6 and June 26, 1990. On the 6th, DeMont Conner was in the law library for approximately three hours. On the 26th, DeMont Conner used the law library for approximately two and one-half hours.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, September 24, 1990.

/s/ Carl Zuttermeister
CARL ZUTTERMEISTER

DEFENDANT'S EXHIBIT J

HALAWA HIGH SECURITY FACILITY
SPECIAL/HOLDING

DATE JUNE 21, 1990 DAY THURSDAY
ACO'S WONGHAM & KOA (2ND, WATCH)

ADDRESSEE	INFORMATION	INFORMER
HEAD COUNT	MADE BY PRICE OFF & WONGHAM ON. . . . H/C (10)	0600
CHOW SERVED	TO INMATES BY ACO KOA/SGT APAO.	0550
FLOOR CHECK	ALL APPEARS NORMAL	0600
CHOW PAU	TRAYS/UTENSILS ACCOUNTED FOR	0615
LAUNDRAY [sic]	P/UP BY ACOS	0615
RECREATION	FOR KING	0600
WEISSMAN	CANCEL, REC, SHOWER, Note: INMATE WEISSMAN DID NOT EAT	0615
SHOWER	FOR SIMS	0620
FLOOR CHECK	ALL APPEARS NORMAL	0630
SHOWER	FOR TEO	0645
FLOOR CHECK	ALL APPEARS NORMAL	0700

REC FINISH	FOR KING AND SHOWER	0710
REC START	FOR SIMS	0715
FLOOR CHECK	ALL APPEARS NORMAL	0730
FLOOR CHECK	ALL APPEARS NORMAL	0800
MEDICATION	HAMMOND, KING, WEISSMAN, SIMS, CARREIRA, BY WONGHAM/APAO.	0800
REC FINISH	FOR SIMS	0810
REC START	FOR BRIONES	0815
FLOOR CHECK	ALL APPEARS NORMAL	0830
FLOOR CHECK	ALL APPEARS NORMAL	0900
REC FINISH	FOR BRIONES AND SHOWER	0905
REC START	FOR LEALAO	0910
FLOOR CHECK	ALL APPEARS NORMAL	0930
MOVEMENT	INMATE, CONNERS FROM THE MEDICAL UNIT.H/C.. . . (11)	1005
REC	COMPLETED FOR LEALAU, SHOWER 1 FOLLOWED	1035
CHOW SERVED.	ALL INMATES FED BY ACOS WONGHAM AND KOA	1045

CHOW DONE	ALL TRAYS AND UTENSEL [sic] P/UP BY ACOS KOA AND WONGHAM	1105
REC	FOR CARREIRA, COMPLETED [sic], REC. SHOWER FOLLOWED	1105
REC	FOR CONNERS, rec Completed SHOWER FOLLOWED	1110
SHOWER	FOR INMATE HAMMOND	1220
LATE ENTRY	INMATE WEISSMAN HAD LUNCH	1045
REC	FOR INMATE SUA	1305
FLOOR CHECK	ALL APPEARS NORMAL	1330
LATE ENTRY****	INMATE WEISSMAN DID EAT LUNCH TODAY.	1330
HEAD COUNT	MADE BY WONGHAM OFF APAO ON . . . HC (11)	1400

HALAWA HIGH SECURITY FACILITY
MEDICAL UNIT

DATE JUNE 21, 1990 DAY THURSDAY

SECOND WATCH: SGT. APAO O/T

ADDRESSEE	INFORMATION	INFORMER
HEAD COUNT	MADE BY SGT. APAO ON AND ACO GISHI OFF. . . . H/C 07. . . .	0600
CHOW SERVED	TO ALL INMATES BY ACO NEGRONE/ RAMOS	0605
CHOW PAU	ALL TRAYS COLLECTED AND ACCOUNTED FOR BY STAFF	0625
FLOOR CHECK	ALL APPEARS NORMAL	0630
FLOOR CHECK	ALL APPEARS NORMAL	0700
FLOOR CHECK	ALL APPEARS NORMAL	0730
MEDICATION	FOR INMATES LOHER AND CONNORS	0750
FLOOR CHECK	ALL APPEARS NORMAL	0800
FLOOR CHECK	ALL APPEARS NORMAL	0830

MOVEMENT	INMATE TAMURA ESCORTED TO STAFF DININGROOM WORKLINE	0900
LEGAL CALLS	MADE AT THIS TIME FOR INMATES [sic] CONNORS,	0925
FLOOR CHECK	ALL APPEARS NORMAL	0930
MOVEMENT	INMATE CONNORS SENT TO S/H HIGH FROM MED. UNIT PRE=HEARING	0957
FLOOR CHECK	ALL APPEARS NORMAL NEW H/C . . . 06 . . .	1000
FLOOR CHECK	ALL APPEARS NORMAL	1030
FLOOR CHECK	ALL APPEARS NORMAL	1100
CHOW SERVED	TO ALL INMATES BY SGT. APAO AND NEGRONE	1115
FLOOR CHECK	ALL APPEARS NORMAL	1130
CHOW PAU	ALL TRAYS COLLECTES [sic] AND ACCOUNTED FOR BY M.A.STAFF	1145
FLOOR DHECK [sic]	ALL APPEARS NORMAL	1200

RECREATION	FOR INMATES QUAD ONE OUT LOPEZ, LOHER, TAMURA, BY SGTAPAO/NEGRONE	1230
FLOOR CHECK	ALL APPEARS NORMAL	1300
RECREATION	OVER INMATES RETURNED TO QUAD TAMURA, LOPEZ, LOHER/APAO/ NOGRONE [sic]	1330
FLOOR CHECK	ALL APPEARS NORMAL	1335
HEACOUNT [sic]	MADE BY SGT. APAO OFF AND M.A. STAFF. . . . 06. . . . H/C	1400

LATE ENTRY	INMATE LOHER ESCORTED TO INTERVIEW ROOM	1335

In the United States District Court

For the District of Hawaii

[Caption Omitted In Printing]

**ORDER ADOPTING MAGISTRATE'S
REPORT AND RECOMMENDATION**

(Filed May 15, 1991)

A Report and Recommendation having been filed
and served on all parties on 1/31/91, and

No objections having been filed by any party,

IT IS HEREBY ORDERED AND ADJUDGED that
pursuant to Title 28, United States Code, Section
636(b)(1)(C) and Local Rule 404-2, the Report and
Recommendation is adopted as the opinion and order
of this Court.

DATED at Honolulu, Hawaii MAY 14 1991.

/s/ Alan C. Kay
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

REPORT RE: PLAINTIFF'S
ORDER TO SHOW CAUSE WHY
DEFENDANTS SHOULD NOT
BE HELD IN CONTEMPT FOR
VIOLATING JUDGE KAY'S 1988
PRELIMINARY INJUNCTION

Factual Background

(Filed Jan. 31, 1991)

Plaintiff, an inmate at Halawa Correctional Facility (High Security), filed his § 1983 civil rights complaint on March 14, 1988 alleging that Defendants violated his Due Process rights by sentencing him to sixty days disciplinary confinement (special holding) without affording certain procedural protections at the Disciplinary Committee hearing.

Plaintiff later amended his complaint on two occasions, the last being filed on September 8, 1989, to include a variety of allegations relating to the Halawa phasing program (so-called behavior modification), conditions of special holding, and various other rules regulating mail, medical care, and other aspects of prison life.

The subject of this Report and of at least seven past motions by Plaintiff for Writ of Habeas Corpus, Temporary Restraining Order, or Preliminary Injunction relates to Plaintiff's access to the Halawa law library and his general access to the courts.

The Preliminary Injunction

On December 2, 1988, Judge Kay adopted this Court's Report recommending that a preliminary injunction (PI) be issued providing that Defendants must do the following:

- "a) Allow the inmate direct physical access to the law library commensurate to that which other medium security inmates enjoy, or provide the inmate with trained legal assistance;
- b) Permit the inmate to retain personal legal materials in his locker on a permanent basis rather than the 2 book and 6 case limit;
- c) Furnish the inmate with an entire writing tablet of paper and debit the inmate's account; and
- d) Permit the inmate to retain an ink pen until 10:00 pm when requested."

Order, December 2, 1988, at 4.

Defendants later moved to modify the PI and Judge Kay granted that motion on March 30, 1989. The PI was modified so that Defendants could satisfy it by sending Plaintiff to the law library at the High Security prison instead of the Medium Security prison. Also, that Plaintiff would be allowed to keep in his cell only two books and four inches of legal papers.

Plaintiff's Order to Show Cause

On July 13, 1990, Plaintiff filed a motion for a contempt hearing for violation of the PI. Plaintiff complained

that Defendants were making a complete mockery of the Court by ignoring or not complying with the PI. Specifically, Plaintiff made the following claims:

- 1) only four hours library access in last four weeks;
- 2) periodic denial of writing tablet and pen;
- 3) xeroxed materials returned only after a week's wait;
- 4) no copy machine available in the High Security library;
- 5) trouble getting manila envelopes for mailing;
- 6) arbitrary approval requirement for legal papers; and
- 7) harassment by law library A.C.O.s

Plaintiff also requested the Court's intervention to keep prison officials from deducting certain funds from Plaintiff's account for paper and pen or to set a certain percentage below which the Defendants would not be able to apply to Plaintiff's debt. Plaintiff requested an immediate hearing on his contempt motion and seeks both criminal¹ and civil contempt. Judge Kay designated hearing on Plaintiff's motion to this Court on August 16, 1990. Further pleadings were ordered.

¹ Plaintiff has no authority to seek criminal contempt. See F.R. Crim. P. 42; Wright, *Federal Practice and Procedure: Criminal* 2d § 701-715 (1982).

Legal Standard

A finding of civil contempt requires clear and convincing evidence that prison officials have not taken all reasonable steps within their power to comply with the Order. *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989). Substantial compliance is a defense and "if a defendant's action appears to be based on a good faith and reasonable interpretation of [the court's order], he should not be held in contempt." *Diamontiney v. Borg*, 918 F.2d 793, 797 (9th Cir. 1990). Moreover, technical or inadvertent violation of an Order generally will not support a finding of civil contempt. *General Signal Corp. v. Donallco Inc.*, 787 F.2d 1376 (9th Cir. 1986).

Response and Reply

Defendants filed their response on September 24, 1990. Only two of the seven specific claims² that Plaintiff made in his July motion relate to the requirements of the PI. Those are claims 1 and 2 dealing with physical law library access and paper and pen. Claims 3-7 do not fall within the parameters of the PI, thus Defendants cannot be held in contempt for this conduct, assuming *arguendo* the legitimacy of those claims. However, the Court notes that the PI in this case does not necessarily encompass the full range of benefits or services that Plaintiff is entitled

² Plaintiff's claim regarding the deduction of funds from his prison account also does not fall within the parameters of the PI. The PI merely provides that, if indigent, Plaintiff is still entitled to receive pen and paper at State expense.

to as part of his constitutional right of access to the courts.³

Plaintiff claims that he was denied adequate law library access in June 1990. The Court finds that Defendants substantially complied with the PI under the circumstances.⁴ The High Security law librarian abruptly left on May 31 without notice on a medical emergency, leaving a shortage of staff to man the library. Nonetheless, Plaintiff was still allowed access when no staff was available in an attempt to comply with the PI. Defendants let Plaintiff use the library while it was unattended on June 26 even though such procedure was contrary to prison rules.

In addition, Plaintiff missed some library time because he was sent to special holding due to his own misconduct. Halawa's policy of not mixing inmates from different modules has a reasonable penological objective (e.g., prevents flow of contraband and reduces inmate violence) and the fact that it prevented Plaintiff from following his normal routine did not violate the PI. There is also evidence that Plaintiff did not submit a timely request for library access for the week of June 11. It is not

³ See *Bounds v. Smith*, 430 U.S. 817 (1977). Plaintiff would be entitled at state expense to "paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them." *Id.* at 824-25. Arguably, constitutional access also would require envelopes in which to send the documents.

⁴ Judge Kay's June 4, 1990 Order regarding Plaintiff's April letter suggests that certain security or administration concerns may prevent Plaintiff from receiving the usual amount of law library time provided under normal circumstances.

unreasonable to require strict adherence to scheduling procedures and to prohibit late filers from causing havoc with the already administratively difficult task of scheduling all inmates enough law library time.

As to paper and pen, Plaintiff admittedly did not receive these items throughout May and early June 1990. This lapse is said to have been inadvertent and was corrected after the commissary clerk was informed of the problem. However, there is evidence that Plaintiff failed to request pen and paper in this time period. According to Unit Team Manager Shelley Nobriga, Plaintiff filed 11 store requests in May and 23 requests in June, only once did he ask for pen and paper and it was provided the next day.

In addition, Nobriga stated that Plaintiff filed 3 grievances in that time period, none of which complained of the lack of pen and paper. There is also evidence that emergency supplies were available upon request to Cinda Sandin (Residency Section Supervisor), but that Plaintiff made no such request. Under these circumstances, it cannot be said that Defendants failed to comply with the PI.

Plaintiff filed a Reply and Order to Show Cause on October 2, 1990. He continues to ask the Court to intervene on his behalf without providing the Court with *facts* to back up his claims. Instead, Plaintiff reportedly has a cache of incriminating documents stored in his cell and awaits an opportunity to personally produce them to the Court. He fears that if Defendants get a hold of them the documents will disappear. Plaintiff also believes that he can elicit favorable support by cross-examining the State's witnesses if a hearing were to be held.

It is significant that Plaintiff has not controverted any of the facts presented in Defendant's response to his motion. He offers no affidavits or documentary evidence. Mere allegations alone are not sufficient for this Court to recommend that a hearing be held on this matter. If Plaintiff has proof to support his claims, he must produce it *prior* to any hearing. As it now stands, Plaintiff is nowhere close to the "clear and convincing" evidence he needs to support his motion to hold Defendants in contempt. In addition, the Court finds that Defendants have taken reasonable steps to comply with the PI in good faith and have, in fact, substantially complied with its terms.

It is therefore recommended that Plaintiff's Order to Show Cause why the Defendants should not be held in Contempt of Judge Kay's December 1988 PI (filed July 13, 1990) and Plaintiff's Motion for Shortening of Time for a Hearing on the Order to Show Cause (filed October 2, 1990) should be DENIED.

DATED: Honolulu, Hawaii, Jan. 31, 1991.

/s/ Bert S. Tokairin
Bert S. Tokairin
U.S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

REPORT AND RECOMMENDATION GRANTING
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed May 21, 1991)

I. STATEMENT OF THE CASE

The original complaint was filed herein on March 14, 1988. By Order dated May 26, 1989, Plaintiff was given leave to file an amended complaint which was filed on September 8, 1989. The named Defendants are: Theodore Sakai, William Oku, Cinda Sandin, State of Hawaii, Harold Falk, Laurence Shohet, Leonard Gonsalves, Kim Thorburn, Frances Sequeira, William Sumners, Robert Johnson, Gordon Furtado, Abraham Lota, Edward Marshal, William Paaga and Brian Lee.

The purported gist of the amended complaint appears to be that: Plaintiff's placement at and within the Halawa High Security Facility, i.e. Plaintiff's so-called "behavior modification program," violates his Fourteenth Amendment due process rights and the Eighth Amendment prohibition against cruel and unusual punishment; security measures such as the use of mechanical restraints, strip searches and prohibitions against unauthorized inmate communications violate his Fourth and Eighth Amendment rights; and various Defendants have engaged in retaliatory acts against him in violation of his unspecified rights.

Defendants filed a motion for summary judgment on November 20, 1989. By order dated November 27, 1989, Plaintiff was directed to respond to Defendants' motion by January 2, 1990, and accordingly filed his Opposition to Defendants' Motion for Summary Judgment with Cross Motion for Summary Judgment (hereinafter "Opposition") on or about December 26, 1990. Thereafter, Defendants submitted a rebuttal memorandum on January 24, 1990, and Plaintiff filed a surrebuttal memorandum on or about February 28, 1990.

In his Opposition, Plaintiff "concedes" his claims with respect to mechanical restraints, strip searches and the right to rehabilitation. Opposition pp. 17 and 19. The remaining issues before the Court are:

1. Plaintiff's allegations that his placement and classification violate his due process rights and his Eighth Amendment rights;
2. Plaintiff's allegations concerning "the arbitrary infringement on . . . [his] right to freedom of communication, religion and expression";
3. Plaintiff's allegations concerning retaliation.

II. SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted where "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c).

As recently explained by the Supreme, summary judgment must be granted against a party who fails to show facts to establish an element essential to his case and on which he will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party need not disprove the claims of his opponent but need only point out why he or she believes he is entitled to summary judgment. *Id.* at 323, 325. Of course, in evaluating the evidence submitted by moving and nonmoving parties, all evidence and inferences to be drawn therefrom must be construed in the light most favorable to the nonmoving party. *T.W. Electrical Services v. Pacific Electrical Contractors Assn.*, 809 F.2d 626, 630-31 (9th Cir. 1987).

III. FACTS

Plaintiff has been convicted of multiple violent crimes including attempted murder, kidnapping, burglary, robbery and rape. He has been sentenced to life imprisonment and his minimum term has been set at 30 years, which includes a 5-year consecutive sentence for escape.

While incarcerated, he has committed numerous misconducts involving assaults or attempted assaults on other inmates and staff, as well as misconducts involving threats to, interference with, harassment and abuse of staff.

Plaintiff has twice attempted escape. The first time resulted in his conviction for attempted escape in the second degree on April 4, 1985. The second attempt resulted in a misconduct charge on September 4, 1984. In short, given the length of his sentence and his manifest predilection for violence, Plaintiff appears to present the stereo typical criminal over which the State has little control or leverage.

Plaintiff is considered a high custodial risk inmate and is incarcerated at Halawa High Security Facility which by law houses the State's most dangerous, predatory and high risk inmates. Of necessity, the high security facility is the most restrictive prison in the state system.

Plaintiff does not dispute this. In his Opposition he admits:

1. Plaintiff *does not* challenge his transfer and placement 'at and within the Halawa High Security Facility,' as it is obviously apparent from Plaintiff's institutional file and from his criminal convictions that the high security facility is a proper place for inmates who pose such a threat to the community and to the prison environment.

Opposition, p. 4.

2. Plaintiff does not dispute Defendants' contention that "Plaintiff . . . present the stereotypical criminal" [and] "is considered a high custodial risk inmate and is incarcerated at Halawa High Security Facility which by law houses the state's most dangerous, predatory and high risk inmates." Defendants' contention in this respect cannot be disputed by Plaintiff.

Opposition, pp. 3 and 5.

IV. PLAINTIFF'S PLACEMENT DOES NOT VIOLATE HIS DUE PROCESS OR EIGHT AMENDMENT RIGHTS

A. Due Process

Plaintiff's claim that his placement at and within the various phases at the High Security Facility violates his due process rights is without merit since his placement does not affect a liberty interest subject to audit under the due process clause.

Placement of a prisoner is primarily a matter within the discretion of prison officials. As stated by the U.S. Supreme Court in *Hewitt v. Helms*, 459 U.S. 460 (1983):

We have repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests. As to the first point, we have recognized that broad discretionary authority is necessary because the administration of a prison is "at best an extraordinarily difficult undertaking," *Wolff v. McDonnell*, *supra*, at 566, and have concluded that "to hold . . . that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." *Meachum v. Fano*, *supra*, at 225. As to the second point, our decisions have consistently refused to recognize more than the most basic liberty interests in prisoners. "Lawful incarceration brings about the necessary withdrawal or

limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 344 U.S. 266, 285 (1948)

459 U.S. at 467.

Inmates do not have a liberty interest in remaining in the general population of inmates or enjoying the same privileges as inmates generally. In *Hewitt v. Helms*, 459 U.S. 460 (1983) the court held that inmates had no liberty interest in being in the general population of inmates rather than in a more restricted segregation. In *Hewitt* the inmate was found not guilty of misconduct, but was required to stay in a segregated and more restrictive area for security reasons. The court held that no liberty interest was involved because the prison officials had discretion to place the inmate in any section so long as there was no cruel and unusual punishment.

Accordingly, due process requirements have not been imposed even when placement has resulted in intra- or inter-state prison transfers. *Meachum v. Fano*, 427 U.S. 215 (1976); *Montanye v. Haynes*, 427 U.S. 236 (1976); and *Olim v. Wakinekona*, 461 U.S. 238 (1983) [sic].

In *Meachum* the issue before the court was:

The question here is whether the Due Process Clause of the Fourteenth Amendment entitles a state [sic] prisoner to a hearing when he is transferred to a prison the conditions of which are substantially less favorable to the prisoner, absent a state law or practice conditioning such transfers on proof of serious misconduct or the

concurrence of other events. We hold that it does not.

Meachum, 427 U.S. at 216.

In explaining its decision, the Court states:

The Fourteenth Amendment prohibits any State from depriving a person of life, liberty or property without due process of law. The initial inquiry is whether the transfer of respondents . . . infringed or implicated a "liberty interest of respondents within the meaning of the Due Process Clause. Contrary to the Court of Appeals, we hold that it did not. We reject at the outset the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause. . . .

Similarly, we cannot agree that *any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. the Due Process Clause by its own force forbids the State from convicting any person of crime and depriving him of his liberty without complying fully with the requirements of the Clause. But given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. . . . The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons.

Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose. That life in one prison is much more disagreeable than [sic] in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules.

Meachum, 427 at 223-225.

See also the companion case *Montanye v. Haynes*, 427 U.S. 236 (1976) where the court upheld the transfer of an inmate, without hearing, after the inmate circulated a document in disregard of applicable prison rules. The U.S. Supreme Court extended its holding in *Meachum* and *Montanye* to interstate prison transfers in *Olim v. Wakinekona*, 461 U.S. 238 (1983).

Nor does state law create a liberty interest entitling Plaintiff to due process protections. The U.S. Supreme Court in *Olim v. Wakinekona* expressly found that Hawaii's rules on classification, placement and transfer did not give rise to a state created liberty interest or otherwise implicate due process concerns.

In *Olim* an inmate raised due process challenges to his involuntary transfer to Folsom State Prison in California. The U.S. District Court for the District of Hawaii dismissed upon the basis that the Hawaii rules did not give rise to a state created interest entitled to protection

under the due process clause. The U.S. Court of Appeal for the Ninth Circuit reversed and held that the rules did create a liberty interest. On appeal to the U.S. Supreme Court, the court overruled the Ninth Circuit and expressly held that the state's rule did not give rise to a state created liberty interest because "[t]he regulation contains no standards governing the Administrator's exercise of his discretion." *Olim v. Wakinekona*, at 243. In addressing this issue the court stated:

The Court of Appeals held that Hawaii's prison regulations create a constitutionally protected liberty interest. . . .

. . . [A] State creates a protected liberty interest by placing substantial limitations on official discretion. An inmate must show "that particularized standards or criteria guide the State's decisionmakers". . . . If the decisionmaker is not "required to base its decisions on objective and defined criteria" but instead "can deny the requested relief for any constitutionally permissible reason or for no reason at all" . . . the State has not created a constitutionally protected property interest.

Hawaii's prison regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under the Due Process Clause. As Rule IV itself makes clear, and as the Supreme Court of Hawaii has held in *Lono v. Ariyoshi*, 63 Haw. at 144-145, . . . the prison Administrator's discretion . . . is completely unfettered. No standards govern or restrict the Administrator's

determination. . . . [T]he Administrator is the only decisionmaker under Rule IV. . . .

Olim v. Wakinekona, 461 U.S. at 248-249.

Rule IV has been succeeded by section 17-201-1, 17-201-2, 17-201-22, 17-201-23 and 17-201-24 of the State of Hawaii Administrative Rules. The present rules are substantially similar to their precursor, Rule IV. The present rules do not restrict the administrator's discretion any more than did Rule IV.

B. Cruel And Unusual Punishment

Plaintiff's placement at and within the High Security Facility *per se* does not constitute cruel and unusual punishment. Plaintiff's placement is and was not punitive in nature. It does not result from a specific act of wrongdoing but from a general evaluation of Plaintiff's conduct and behavior. Although it was addressing the issue of punishment with respect to pretrial detainees, the U.S. Supreme Court in *Bell v. Wolfish*, 441 U.S. 520 (1979) stated that "not every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense." *Id.* at 441 U.S. at 537. In order for a sanction to be considered punishment, punitive intent must be [sic] shown. "[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate government objective, it does not, . . . amount to punishment." *Id.* 441 U.S. at 539. The court expressly recognized that "maintaining institutional security and preserving social order and discipline are essential goals that may require limitation or retraction of the retained constitutional

rights of both convicted prisoners and pretrial detainees. *Bell*, 441 U.S. at 546.

Accordingly, Plaintiff's complaint that his placement violated his rights to due process and his Eighth Amendment rights is without merit.

V. THE STRIP SEARCHES, MECHANICAL RESTRAINTS AND PROHIBITION OF UNAUTHORIZED INMATE COMMUNICATION ARE VALID SECURITY MEASURES

Although the court must play an important role in ensuring that government officials act pursuant to law, the court should not interfere with matters within the discretion of those who operate the State's prison system. In *O'Lone v. Estate of Shabazz*, 482 U.S. ___, 107 S. Ct. 2400, 2407, 96 L. Ed. 2d 282, 293 (1987) the court stated:

We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to "substitute our judgment on . . . difficult and sensitive matters of institutional administration," *Block v. Rutherford*, 468 U.S. 576, 588, 82 L. Ed. 2d 438, 104 S. Ct. 3227 (1984), for the determinations of those charged with the formidable task of running a prison.

In *Turner v. Safley*, 482 U.S. ___, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 77 (1987) the court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."

Assuming *arguendo* that any of the complained of policies infringe on Plaintiff's constitutional rights, nonetheless they are valid under *Turner v. Safley*. This is patently true of the policies at issue here, which concern classification and placement of inmates, discussed *infra*, use of mechanical restraints, strip searches, and prohibition of unauthorized inmate communication in foreign language. These are clearly related to valid penological goals and are not unreasonable.

A. Unauthorized Inmate Communication In Foreign Language

In two unrelated incidents, Plaintiff was found guilty of disobeying an order to stop communicating with another inmate in a foreign language. Plaintiff claims that any prohibition against communicating in a foreign language violates his First Amendment rights.

The Supreme Court has stated that the First Amendment rights of a prisoner may be validly regulated in the infringement is reasonably related to a legitimate penological goals. In determining whether regulations are valid under the Constitution, courts are directed to consider: 1) whether the regulation has a logical connection to the legitimate government interest invoked to justify it; 2) whether there are alternative means of exercising the right that remain open to the inmates; 3) the impact accommodation of the asserted constitutional right would have on other inmates, guards, and prison resources; and 4) the presence or absence of ready alternatives that fully accommodate the prisoners' rights at *de minimis* cost to valid penological interests. *McCabe v. Arave*, 827 F.2d 634

(9th Cir. 1987); citing *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

The prohibition against English speaking inmates communicating in languages other than English has a logical connection to a legitimate government interest. The interest is to maintain internal prison security by preventing the entry of contraband, checking for rumors or plans of escape, extortion or of fights within the facility. To allow Plaintiff to continue to communicate with other inmates in a foreign language would have a considerable impact on internal prison security, which in turn would affect the inmates, guards, and prison resources.

B. Strip Searches

In his opposition at page 17, Plaintiff concedes his claims that visual strip violates his Fourth Amendment rights. It is doubtful that Fourth Amendment rights survive conviction and incarceration. In *Hudson v. Palmer*, 468 U.S. 517 (1984), the court said:

[a] right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to insure institutional security and internal order. We are satisfied that society would insist that the prisoners expectation of privacy always yield to what must be considered the paramount interest in institutional security.

468 U.S. 527-28. Although *Hudson* involved cell searches, federal appellate courts dealing with strip searches of convicts have been equally reluctant to find any Fourth

Amendment right. *See, Goff v. Nix*, 803 F.2d 358 (8th Cir. 1986).

In *Hay v. Waldron*, 834 F.2d 481 (5th Cir. 1987) the court dealt with the constitutionality of a strip search policy virtually identical to the one at issue here. The Texas Department of Corrections strip searched inmates any time they left or entered their cells. Applying the balancing test set forth in *Bell*, the Fifth Circuit rejected the claim that searches should only be conducted upon cause noting:

In the case before us, the strip search policy evolved in response to the rising tide of violence which flooded Texas prison systems in the recent past . . . the record contains substantial evidence that the strip search policy reasonably relates to legitimate penological objectives. We find no evidence that the strip search procedure is an exaggerated response by prison officials to conditions within the prison system.

834 F.2d at 486. Similarly, in *Goff, supra*, the Eighth Circuit faced a civil rights action brought by inmates seeking to invalidate a policy of conducting strip searches any time they moved outside their living unit. The court found these blanket searches did not violate any Fourth Amendment right which inmates *might* have.

Against the legitimate and weighty concerns on the part of ISP administrators rests the invasion of the inmates' personal rights. While VBC strip searches admittedly are intrusive and unpleasant, a prison inmate has a far lower expectation of privacy than do most other individuals in our society.

803 F.2d at 365. Recently, the Ninth Circuit jointed this line of reasoning in *Rickman v. Avanti*, 854 F.2d 327 (9th Cir. 1988). *Rickman* involved an Arizona prison policy requiring prisoners in the administrative segregation unit to submit to visual strip and body cavity searches when leaving their cells. Administrative segregation is the highest custody status accorded high custodial risk inmates under Arizona's system. Applying the analysis of *Bell v. Wolfish*, the Ninth Circuit found such routine visual searches to be reasonable and constitutional. *See also, Campbell v. Miller*, 787 F.2d 217 (7th Cir. 1986); *Arruda v. Fair*, 710 F.2d 886 (1st Cir. 1983).

C. Mechanical Restraints

Plaintiff also concedes his claims with respect to the use of mechanical restraints in his opposition at page 17. Leg chains and handcuffs are used on inmates at Halawa High Security, particularly those in disciplinary segregation or phase I, not as a punishment, but because, by and large these inmates are least trustworthy and present the greatest risk of harm to staff and other inmates who would be the direct and immediate targets of their violent behavior. Neck chains, however, are not routinely employed.

The court in *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979) found regulations that contemplated the use of handcuffs and belts routinely to be reasonable and unobjectionable. There is no evidence to support Plaintiff's nonconclusory claims that the use of handcuffs, belts and leg irons are excessive cruel and/or unusual punishment.

VI. RETALIATION

Throughout his complaint Plaintiff has vaguely and conclusorily claimed that Defendants have "retaliated" against him in violation of unspecified rights. For example, in his complaint at paragraph 41 he states that Defendant Sequeira retaliated against him when Defendant Sequeira told Plaintiff, in a grievance response, on June 23, 1987, "your behavior predicates advancement to Module 'B'." (According to Plaintiff, he had "held a virtual positive behavior since his arrival to HHSF in September 3, 1985." This of course is not true. However, Plaintiff does not dispute that he pleaded guilty to assaulting another inmate on January 1, 1987.) See also paragraph 52 where Defendant Gonsalves is accused of violating Plaintiff's "rights" by telling him he is a "chronic complainer."

Plaintiff's claims of retaliation are unsupported and seem for the most part to stem or relate to various adjustment committee proceedings. There is no evidence to show any retaliatory intent on the part of any Defendant. Even if any defendant were so motivated, all incidents of misconduct are investigated and referred to an independent committee which determines whether or not any infraction occurred thereby protecting against any such motivation.

In any event, Plaintiff fails to set forth any fact and to meet his burden under *Celotex*. Nowhere in his Opposition or Surrebuttal Memorandum does he set forth any factual support for his claims of retaliation. Plaintiff appears to rely on Rule 56(f) to avoid Defendants' motion for summary judgment on this issue. However, Plaintiff is not entitled to relief under Rule 56(f), Federal Rules of

Civil Procedure. In order to withstand a motion for summary judgment under Rule 56(f), Plaintiff must show what material facts he seeks to obtain; why they are exclusively known to the other party and what steps Plaintiff has taken to obtain those facts. 10 A.C. Wright, D. Miller & M. Kane *Federal Practice and Procedure* § 2641 at 549; *Klingele v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988).

Plaintiff has failed to make any such showing. Since Plaintiff is claiming that Defendants retaliated against him, it is not unreasonable to require that he set forth the specific facts surrounding each instance of claimed retaliation.

VII. MISCELLANEOUS GRIPES

A. Exercise

Plaintiff complains that while confined in either disciplinary segregation or Phase I he was subjected to "inadequate exercise and recreation" and that he was confined for at least 22 hours a day. Prisoners have a right to reasonable opportunities for regular exercise and recreation. However, what constitutes a "reasonable opportunity" varies with the status of the prisoner. *Laaman v. Helgmos*, 437 F. Supp. 269, 269 (D. N.H. 1977) whether a particular amount of exercise is required depends on whether such amount of exercise time can be provided safely and practically. *Inmates of B Block v. Jeffes*, 470 A.2d 176 (Pa. Cmmw. 1983), *affirmed* 475 A.2d 743 (Pa. 1984). Generally this means outdoor recreation, although courts have recognized that circumstances at individual penal facilities may render outdoor exercise and recreation not feasible. *Parnell v. Waldrep*, 511 F. Supp. 764 (D. N.C.

1981), and outdoor exercise may be denied due to inclement weather, unusual circumstances, or disciplinary needs. *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979).

The policy at HHSF is that all inmates received five hours of outdoor recreation per week, one hour per day on each weekday. Exercise is not provided on weekends. This comports with the Ninth Circuit's holding relating to amount of exercise time in *Spain v. Procunier, supra*.

Defendants' decision to limit outdoor exercise to five hours per week is based on sound administrative considerations, as well as valid penological objectives. For obvious security reasons, when an inmate is in disciplinary segregation or Phase I, they go to the recreation area alone. Further, as there are normally eight inmates housed in the special holding area, it would be difficult to permit each inmate more than one hour of recreation per day without straining limited security resources.

B. Form 106

Plaintiff complains about the use of a Form 106 Minor Conduct Form. This form is used to record observations by ACO's of inmate behavior and is a warning. Contrary to Conner's claim, no due process is required in connection with the use of this form. Form 106's do not, in and of themselves, result in the imposition of disciplinary sanctions. A collection of unfavorable 106's may trigger disciplinary proceedings, but if this occurs, the inmate is accorded all due process required in connection with such proceedings.

C. Plaintiff Has No Right To Rehabilitation

Plaintiff also concedes that he has no right to rehabilitation at page 19 of his opposition. While rehabilitation is an important penological goal, *Pell v. Procunier*, 417 U.S. 817, nonetheless inmates have no constitutional right to treatment, *Neuman v. Alabama*, 559 F.2d 283 (5th Cir. 1977); *French v. Heyne*, 547 F.2d 994 (7th Cir. 1976); *McCray v. Sullivan*, 509 F.2d 1332 (5th Cir. ____); *Feidericks v. Huggins*, 711 F.2d 31 (4th Cir. 1983); *Peck v. South Dakota Penitentiary Employees*, 332 N.W.2d 714 (S.D. 1983); and *Lovell v. Brennan*, 5566 [sic] F. Supp. 672 (D. Me. 1983); aff'd 728 F.2d 560 (1st Cir. 1984).

Further Plaintiff has no sate [sic] created interest in rehabilitation. State statute § 353-7, Hawaii Revised Statutes, sets forth no specific procedures or guidelines and therefore does not create such an interest. *Toussant v. McCarthy*, 801 F.2d 1080. The cases cited by Plaintiff are to be distinguished on this basis or on the basis that they arose in the context of "totality of conditions" type lawsuits, see e.g. *Palmigiano v. Garrahy*, 443 F. Supp. 956 or *Pugh v. Locke*, 406b [sic] F. Supp. 318 (a type of lawsuit expressly disapproved by the Ninth Circuit in *Hoptowit v. Ray*, 682 F.2d 1237 (1988)). As conceded by Plaintiff, inmates in Modules B and C are allowed training and assignments on workline. Only those inmates in disciplinary segregation and phase I are precluded from such privileges.

D. Invalid Rule

In his opposition Plaintiff, for the first time, challenges the operation of the facility on the basis that the manner in which it is run is a "rule" under state law

which was not adopted pursuant to the Hawaii Administrative Procedures Act, Hapa; Chapter 91, Hawaii Revised Statutes.

As noted by Defendants, Plaintiff misleadingly and incompletely quotes the definition of "rule" in support of this contention. Opposition, pp. 7 and 8. In its entirety, "Rule" is defined in Haw. Rev. State. [sic] §91-1(4) (1985) as follows:

"Rule" means each agency statement of general or particular applicability and future that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. *The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.* (Emphasis added)

Since the prison serves as the detention place for inmates committed to the custody of the Director of Corrections as a result of their criminal convictions, any policy concerning the operation and management of the prison may be said to impact on the inmates. Nonetheless, notwithstanding such impacts, regulations concerning the operation and management of the prison are generally matters of "internal management" and not rules, e.g., *Tai v. Chang*, 58 Haw. 386, 570 P.2d 563 (1977); *Holdman v. Olim*, 59 Haw. 346, 581 P.2d 1164 (1978), particularly when such regulations concerning the custodial management of public property entrusted to the agency, e.g., *Holdman v. Olim*, 59 Haw. 346, 581 P.2d 1164 (1978) *Ah Ho v. Cobb*, 62 Haw. 632, 673 P.2d 1030 (1983).

In *Tai v. Chang*, the inmate filed a petition for habeas corpus to challenge the legality of his transfer to an out-of-state prison on the basis, *inter alia*, that it was pursuant to an unpublished rule. Although the Court's decision was based in part on Haw. Rev. Stat. §353-3 (1976) (repealed 1987), the Hawaii Supreme Court also based its decision upon the separate ground that:

Under HAPA, however, the term rule is defined to exclude "regulations concerning only the internal management of an agency." HRS § 91-1(4). The legislative history of HAPA discloses that policy decisions regarding state penal institutions were considered to be regulations that involved only the internal management of these institutions. In commenting on the definition of rule as used in HAPA, the Standing Committee Report No. 8, 1961 Hawaii House Journal 656, stated:

It is intended by this definition of "rule" that regulations and policy prescribed and used by an agency principally directed to its staff and its operations are excluded from the definition. In this connection your Committee considers *matters relating to the operation and management of state and county penal . . . institutions . . . (to be) primarily a matter of "internal management"* (and excluded from) this definition.

Tai v. Chang, 58 Haw. at 387, 570 P.2d at 564 (emphasis added).

Accordingly Plaintiff challenge would appear to be without merit. Moreover it would appear that this issue is not one that may be appropriately resolved by this Court. The Federal Court does not have the jurisdiction to

enforce a State law or rule unless a Federal right is being violated. *Bates v. Sponberg*, 547 F.2d 325 (6th Cir. 1976).

E. Adequate Medical And Dental Care; Psychological And Psychiatric Examinations

Plaintiff in his complaint alleges that Defendants "discriminate against Plaintiff and all inmates on phase one and disciplinary segregation for access to adequate medical and dental care," and further, that "Defendants deny Plaintiff psychological and psychiatric examinations." Amended Complaint, Par. 30 and 32. Plaintiff, however, fails to support these conclusory allegations with any factual showing of discrimination or of discriminatory intentions by any of the Defendants (*Gutierrez v. Municipal Court of SE Judicial District*, 838 F.2d 1031 (9th Cir. 1988)) or of any deliberate indifference to his serious medical needs. (*Estelle v. Gamble*, 429 U.S. 97 (1976)). In the absence of such showing, Plaintiff's complaint fails to rise to the level of a constitutional claim and Plaintiff further fails to show why any of the Defendants may be held liable.

F. Inadequate Lighting And Cell Furniture

Plaintiff claims that inadequate lighting, the lack of desk and chair, lack of a removable bed frame and having his food tray which is wrapped in saran wrap, and placed on the floor are cruel and unusual punishments. Plaintiff, however, fails to cite to any authority supporting the proposition that in the context of a maximum security facility, such admittedly spartan conditions are cruel and

unusual punishments. See, *Adams v. Kincheloe*, 743 F. Supp. 1385 (ED Wash. 1990) holding that food dropped on floor without eating utensils or tray was not cruel and unusual punishment. Even assuming *arguendo* that Plaintiff has some constitutional right with respect to "adequate" lighting, desk, chair and removable bed frame, such rights could not be absolute, but are subject to the limitations expressed in *Turner v. Safely*. Given Plaintiff's concessions as to both the appropriateness of Plaintiff's placement at the High Security Facility and as to the nature of the population of inmates at the High Security Facility, the spartan conditions of Plaintiff's confinement appear reasonably related to the prison's patent security concerns. Affidavit of Cinda Sandin, paragraph 10, attached to Defendants' Motion for Summary Judgment. In any event, Plaintiff fails to indicate which, if any, of the Defendants actually caused his claimed injury so as to be liable under *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). As discussed in greater detail, *supra*, Defendants' nexus with these matters seems to stem solely from their official capacities and accordingly they are protected by sovereign immunity. See *Pembaur v. City of Cincinnati*, 475 U.S. 468, 483 (1986).

G. First Amendment Claims

Plaintiff also alleges diverse First Amendment violations. ("Defendants deny Plaintiff to receive pictures, brochures, newspaper clippings, religious materials and crossword puzzles . . . and instead only permit him to have letters. . . ."; "Defendants deny Plaintiff religious

counseling while in phase one and disciplinary segregation"; and "Defendants deny Plaintiff his right to freedom of expression and association by imposing a publisher only rule." Amended Complaint, pars. 29 and 31.)

Again, Plaintiff fails to set forth any authority supporting the existence of alleged constitutional rights, e.g., pictures, brochures, newspaper clippings and puzzles. Plaintiff also fails to set forth any factual substantiation that he suffered any injury, or that Defendants actually caused such injury and are therefore liable. For example, with respect to the "publisher only rule" Plaintiff does not specify what it is or how or if he suffered actual injury. Plaintiff does not controvert Defendants' statement that an "inmate may order approved books through the library or from a publisher. They may be hard bound and are not required to be donated to the library. Inmates regularly subscribe to a variety of magazines." Affidavit of Cinda Sandin, par. 13. Plaintiff further does not specify any instance when he was adversely affected by the foregoing.

Plaintiff has made other unsubstantiated and apparently conflicting allegations. (See e.g. Amended Complaint, paragraph 34: "Defendants subject Plaintiff to double celling in module "A" which one person must sleep on the floor" - notably there is no allegation that Plaintiff in fact slept on the floor; paragraph L, page 14: "Defendants subjected plaintiff to double celling"; and compare with claim C: "Defendants subjected plaintiff to punitive isolation.")

In reviewing all of Plaintiff's unsubstantiated allegations, they are noticeably lacking in any claim of personal

injury. It is exceedingly clear that Plaintiff's complaint is with the restrictive rules that he must abide by. It is also clear that Defendants are named in this suit only in their official capacities. Plaintiff makes this crystal clear on page 12 of his amended complaint under the section entitled "Official responsibilities" where Plaintiff states that essentially the basis of his claims against the administrative defendants arise from their nexus with the rules Plaintiff is protesting. This conclusion is bolstered by Plaintiff's statement of his claims on page 13 of the Amended Complaint. See, e.g. paragraphs (A), (B), (C), (E), (G), (I), (J), (N) and (O) which premise liability on the programs, rules and policies at Halawa High Security Facility. Sovereign immunity precludes any monetary award.

VIII. THE NAMED DEFENDANTS ARE PROTECTED FROM LIABILITY BY SOVEREIGN IMMUNITY

In essence all of Plaintiff's claims are against Defendants in their official capacities and this entire proceeding should be dismissed accordingly. The State of Hawaii enjoys sovereign immunity in claims brought under section 1983 because it has not waived its Eleventh Amendment immunity, nor has Congress overridden that immunity. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Where the claims are against state officials in their official capacities, the state officials are protected by the same sovereign immunity as the state. *Id.* The U.S. Supreme Court has reaffirmed that neither the state nor state officials are persons under section 1983. *Will v. Michigan Department of State Police, et al.*, 109 S. Ct. 2304 (1989).

Official capacity suits generally represent another way of pleading an action against an entity of which the officer is an agent. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690 (1978). Where the officials are acting pursuant to policy, the government agency is the party responsible for their actions. *Pembaur v. City of Cincinnati*, 475 U.S. 468, 483 (1986). In *Hutto v. Finney*, 437 U.S. 678, 699 (1978) the court held that a case challenging the conditions at the state prisons in Arkansas was a suit against the prison officials in their official capacities.

Plaintiff's claims are in substance directed at departmental policies. There is no credible showing that any Defendant went beyond the scope of his authority or disregarded the policies. Further there is no showing of personal involvement by the named Defendants who appear to be Defendants only because they were administrators. Since the claims for damages in the complaints are against Defendants in their official capacities, the entire complaint should be dismissed.

IX. THE NAMED DEFENDANTS ARE ALSO PROTECTED BY QUALIFIED IMMUNITY

Even if some claims are against Defendants in their individual capacities, Defendants are immune from liability for damages because of qualified immunity.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the court held that certain government officials have a qualified immunity from liability. The immunity is available unless the official knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the

Plaintiff, or unless he took the action with the malicious intent to cause a deprivation of constitutional rights or injury. *Id.* at 815. Qualified immunity extends to prison officials. *Procunier v. Navarette*, 434 U.S. 555 (1978).

In *Anderson v. Creighton*, 483 U.S. ___, 107 S. Ct. 3034, 97 L. Ed. 523 (1987), the court clarified its view on qualified immunity by stating that the trial court must answer the objective question of whether a reasonable public official could have believed he was violating a clearly established right of the Plaintiff. The court stated that in order for an individual defendant exercising discretion to be held liable, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* 107 S. Ct. at 3039, 97 L. Ed. at 531.

Plaintiff has failed to show any act by the individual Defendants which violated his constitutional rights. In fact the claims raised in the complaint do not show any violation of Plaintiff's constitutional rights.

X. PLAINTIFF HAS FAILED TO SHOW THAT THE NAMED DEFENDANTS ACTUALLY CAUSED HIM ANY CONSTITUTIONAL DEPRIVATIONS

It is incumbent upon Plaintiff to show that each Defendant actually caused the constitutional deprivation he claims to have suffered. He has failed to do this. "A person deprives another 'of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes

the deprivation of which [the] Plaintiff complains.' *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). . . . " *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (emphasis added). Further, "[t]he inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation." *Id.* at 633. Administrative defendants cannot be held liable on the basis of *respondeat superior*. That doctrine does not apply in section 1983 cases. *Monell, supra*, at 693.

Plaintiff has many grievances for which he clearly blames the named Defendants. His accusations are insufficient however. He must show the facts upon which he premises the individual liability of each Defendant. He has utterly failed to do this. The complaint should accordingly be dismissed.

XI. CONCLUSION

For the reasons stated above, it is recommended that Defendants' motion for summary judgment be granted, Plaintiff's cross motion for summary judgment be denied and the complaint be dismissed with prejudice.

DATED: Honolulu, Hawaii, May 21, 1991.

/s/ Bert S. Tokairin
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

(Filed June 18, 1991)

PLAINTIFF DeMONT R.D. CONNER, HEREBY
OBJECTS TO THE MAGISTRATE'S REPORT AND RECOMMENDATION.

THIS OBJECTION IS BASED ON THE FOREGOING
AS WELL AS THE FILES AND RECORDS IN THIS CASE.

STANDARD OF REVIEW FOR SUMMARY JUDGEMENT

PLAINTIFF OBJECTS TO THE ONE-SIDED "SUMMARY JUDGEMENT STANDARD" FOUND ON PAGE 3 OF THE MAGISTRATES REPORT AND RECOMMENDATION (HEREINAFTER "R AND R"). THE "STANDARD" CITED BY THE MAGISTRATE IS CLEARLY TWISTED TO FAVOR GIVING THE DEFENDANTS A SWIFT VICTORY, WHICH, THE DEFENDANTS ARE NOT WHOLLY ENTITLED TO.

RULE 56(C) OF THE FEDERAL RULES OF CIVIL PROCEDURE PROVIDES THAT SUMMARY JUDGEMENT SHALL BE ENTERED WHEN:

. . . . THE PLEADINGS, DEPOSITIONS, ANSWERS TO INTERROGATORIES, AND ADMISSIONS ON FILE, TOGETHER WITH THE AFFIDAVITS, IF ANY, SHOW THAT THERE IS NO GENUINE ISSUE AS TO ANY

MATERIAL FACT AND THAT THE MOVING PARTY IS ENTITLED TO A JUDGEMENT AS A MATTER OF LAW.

THE MOVING PARTY HAS THE INITIAL BURDEN OF "IDENTIFYING FOR THE COURT THOSE PORTIONS OF THE MATERIALS ON FILE IN THE CASE THAT IT BELIEVES DEMONSTRATE THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT." *T.W. ELECTRICAL SERVICE, INC. V. PACIFIC ELECTRICAL CONTRACTORS ASS'N*, 809 F.2D 626, 630 (9TH CIR. 1987), *CITING CELOTEX CORP. VS. CATRETT*, 477 U.S. 317, 323, 106 S.CT. 2548, 2553 (1986). THE MOVANT MUST BE ABLE TO SHOW "THE ABSENCE OF A MATERIAL AND TRIABLE ISSUE OF FACT," *RICHARDS VS. NEILSEN FREIGHT LINES*, 810 F.2D 898, 902 (9TH CIR. 1987), ALTHOUGH IT NEED NOT NECESSARILY ADVANCE AFFIDAVITS OR SIMILAR MATERIALS TO NEGATE THE EXISTENCE OF AN ISSUE ON WHICH THE NON-MOVING PARTY WILL BEAR THE BURDEN OF PROOF AT TRIAL. *CAL. ARCH. BLDG. PROD. V. FRANCISCAN CERAMICS*, 818 F.2D 1466, 1468 (9TH CIR. 1987), *CERT. DENIED*, 108 S.CT. 698 (1988). *SEE, CELOTEX*, 477 U.S. AT 325, 106 S.CT. AT 2553. *BUT CF. ID.*, AT 328, 106 S.CT. AT 2555-56 (WHITE, J., CONCURRING).

WILDER VS. TANOUYE, 753 P.2D 816 (1988 HAW.APP.) IS A CASE THAT COMES CLOSEST TO CIRCUMSTANCES IN THE CASE-AT-BAR. *WILDER*, SUPRA, CHALLENGED A "DIRECTIVE" THAT PERTAINED ONLY TO AN INDIVIDUAL HOUSING UNIT WITHIN A FACILITY. THUS, THE COURT IN *WILDER*, HELD THAT, [IN THE CONTEXT OF INSTITUTIONS]

"RULE" WITHIN THE MEANING OF RELEVANT STATUTES APPLIES TO "RULES" THAT GOVERN A FACILITY AND NOT TO RULES THAT GOVERN ONLY A PARTICULAR HOUSING UNIT OF A FACILITY.

THEREFORE, AS IS EXPLICITLY UNDERSTANDABLY CLEAR FROM THE RULING IN *WILDER*, § 17-200-1 OF TITLE 17 ADMINISTRATIVE RULES OF THE CORRECTIONS DIVISION (TITLE 17) GOVERNS THE ADOPTION OF RULES RELATING TO INDIVIDUAL FACILITIES. TITLE 17 § 17-200-1 SPECIFICALLY STATE [sic]:

(A) THIS SUBTITLE SHALL GOVERN THE CORRECTIONS DIVISION OF THE DEPARTMENT [OF PUBLIC SAFETY], STATE OF HAWAII, EACH INDIVIDUAL FACILITY MAY ADOPT RULES GOVERNING ITS UNIQUE SITUATION PURSUANT TO CHAPTER 353, SUBJECT TO THE APPROVAL OF THE DIRECTOR OF THE DEPARTMENT [OF PUBLIC SAFETY] AND THE GOVERNOR. HOWEVER, SUPERSESSION OF THESE RULES SHALL BE PERMITTED ONLY WHERE NECESSARY DUE TO THE UNIQUE CHARACTERISTICS OF THE FACILITY.

THUS, TITLE 17 LEFT IT UP TO THE DISCRETION OF THE INDIVIDUAL FACILITIES THAT THEY "MAY" CHOOSE TO ADOPT "RULES" GOVERNING ITS UNIQUE SITUATION. THEY DON'T HAVE TO ADOPT SUCH "RULES", BUT, IF AN INDIVIDUAL FACILITY ELECTS TO ADOPT "RULES" THAT GOVERN ITS UNIQUE SITUATION, SUCH "RULES" SHALL BE MADE PURSUANT TO CHAPTER 353 (HAWAII REVISED STATUTES) AND SUBJECT TO THE

APPROVAL OF THE DIRECTOR AND THE GOVERNOR. SEE EXHIBIT "D" ATTACHED TO PLAINTIFF'S OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGEMENT.

HAW. REV. STAT. § 353-3 ALSO REQUIRES THAT IF THE DIRECTOR ELECTS TO MAKE "RULES" TO GOVERN ALL FACILITIES IN THE STATE IT MUST DO SO WITH THE APPROVAL OF THE GOVERNOR. SEE EXHIBIT "C" ATTACHED TO PLAINTIFF'S OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGEMENT. SEE ALSO "CROSS REFERENCES" SECTION OF HAW. REV. STAT. § 353-3, EXHIBIT "C", WHERE IT CITES: "RULEMAKING, SEE CHAPTER 91.

INDEED, THE DIRECTOR OF THE [DEPARTMENT OF PUBLIC SAFETY] DID IN FACT SEEK AND GOTTEN [sic] THE APPROVAL OF THE GOVERNOR [sic] WHEN IT CHOSE TO MAKE "TITLE 17". TITLE 17 IS APPROVED BY THE GOVERNOR OF THE STATE OF HAWAII. PLAINTIFF CONTENDS THAT IF THE DIRECTOR IS BOUND BY LAWS THAT GOVERN HIM IN THE PROMULGATION OF "RULES", THEN SO IS DEFENDANTS OKU, AND, SHOHET. TITLE 17 § 17-200-1 GOVERNS THESE DEFENDANTS.

THEREFORE, WHEN DEFENDANTS OKU AND SHOHET MADE THE S.M.C.P. THEY DID SO WITHOUT THE APPROVAL OF THE GOVERNOR AND THE DIRECTOR. THUS, THEY ACTED CONTRARY TO CLEARLY ESTABLISHED LAWS AND RULES AND REGULATIONS. DEFENDANT SHOHET ADMITTED IN AN AFFIDAVIT THAT WHEN THE S.M.C.P. AND ITS POLICIES AND PROCEDURES WERE MADE, IT WAS ONLY

APPROVED BY DEFENDANT OKU AND A MS. EDITH WILHELM WHO WAS MERELY AN ASSISTANT ADMINISTRATOR IN THE CORRECTIONS DIVISION. SEE PAGE 3 OF EXHIBIT "E" ATTACHED TO PLAINTIFF'S OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGEMENT.

IN *SIMS VS. FALK, ET AL.*, CIVIL NO. 88-0348 DAE, (JANUARY 4, 1989 U.S.D.C.-D.HAW) JUDGE EZRA ACCEPTED AS FACT THAT "DEFENDANTS DEVELOPED AND IMPLEMENTED THE [S.M.C.P.] TO CONTROL THE BEHAVIOR OF HIGH SECURITY FACILITY INMATES." SEE EXHIBIT "A" ATTACHED TO PLAINTIFF'S SIRREBUTTAL MEMORANDUM FILED IN THIS CASE.

WHEREFORE, IT IS NOT DISPUTED BY THE DEFENDANTS THAT THE S.M.C.P. GOVERNS THE HIGH SECURITY FACILITY - AND NOT JUST A PARTICULAR HOUSING UNIT. IT IS ALSO INDISPUTABLE THAT THE S.M.C.P. WAS NOT APPROVED BY THE DIRECTOR OR GOVERNOR.

THEREFORE, THE ONLY ESSENTIAL QUESTIONS THAT PERVADES ARE:

1. IS THE S.M.C.P. A "RULE" AS DESCRIBED IN CHAPTER 91 OF HAPA?
2. IF SO, IS THE "RULEMAKING" PROCEDURES MANDATED IN CHAPTER 91 OF HAPA APPLICABLE TO THE HALAWA HIGH SECURITY FACILITY?

PLAINTIFF CONTENDS THAT "YES" IS THE ANSWER TO BOTH QUESTIONS. PLAINTIFF BASES HIS CONTENTION ON THE FOLLOWING POINTS:

HAPA STATES:

"RULES MEAN EACH AGENCY STATEMENT OF GENERAL OR PARTICULAR APPLICABILITY AND FUTURE EFFECT THAT IMPLEMENT, INTERPRETS OR PRESCRIBES LAW OR POLICY OR DESCRIBES THE ORGANIZATION, PROCEDURE, OR PRACTICE REQUIREMENT OF ANY AGENCY" . . .

(HAW.REV.STAT. § 91-1(4))

THE MAGISTRATE POINTS OUT THAT "PLAINTIFF MISLEADINGLY AND INCOMPLETELY QUOTES THE DEFINITION OF "RULE" IN SUPPORT OF HIS CONTENTION. PLAINTIFF'S "INCOMPLETE" QUOTE OF CHAPTER 91 § 91-1(4) WAS NOT DONE TO "MISLEAD"[] ANYONE. PLAINTIFF WAS CITING THOSE PARTS THAT HE SEES AS PERTINENT. IF THE DEFENDANTS WANT TO ARGUE THAT "THE TERM DOES NOT INCLUDE REGULATIONS CONCERNING ONLY THE INTERNAL MANAGEMENT OF AN AGENCY [sic]" . . . THEN THEY - AND NOT THE MAGISTRATE - SHOULD COME FORWARD AND ARGUE THIS POINT. BUT, THEY DO NOT. INSTEAD THEY HAVE AVOIDED THE ARGUMENT UNTIL THEY FILED THEIR REBUTTAL MEMORANDUM, WHICH, EVEN THEN THEIR ARGUMENT WAS "MISLEADING" AND TWISTED.

IN ANY CASE, AS STRESSED BY PLAINTIFF THROUGHOUT HIS PLEADING'S [sic] HE DOES NOT CHALLENGE THE "REGULATIONS CONCERNING ONLY THE INTERNAL MANAGEMENT OF AN AGENCY". PLAINTIFF EVEN SUBMITS THE "REGULATIONS" THAT CONCERN "ONLY THE INTERNAL MANAGEMENT" OF HALAWA HIGH SECURITY

FACILITY TO SHOW THE DIFFERENCE BETWEEN THAT AND THE S.M.C.P. POLICIES AND PROCEDURES. SEE EXHIBIT "A" ATTACHED TO PLAINTIFF'S OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGEMENT. THE FIRST THREE PAGES OF EXHIBIT "A" SET FORTH THE "STATEMENT OF GENERAL OR PARTICULAR APPLICABILITY AND FUTURE THAT IMPLEMENTS, INTERPRETS, OR PRESCRIBES LAW OR POLICY, OR DESCRIBES THE ORGANIZATION, PROCEDURE, OR PRACTICE REQUIREMENTS OF" THE HIGH SECURITY FACILITY. WHEREAS, THE DOCUMENT ENTITLED "INMATE GUIDELINES" SPECIFICALLY CONCERNS "ONLY THE INTERNAL MANAGEMENT OF" THE HIGH SECURITY FACILITY. THE DIFFERENCES ARE CLEAR AND PRECISE.

NOW THAT PLAINTIFF HAS SHOWN THAT THE S.M.C.P. IS A "RULE" THAT GOVERNS THE ENTIRE FACILITY AND NOT JUST A PARTICULAR HOUSING UNIT WITHIN THE FACILITY I.E. EXHIBIT "A" INMATE GUIDELINES PHASE I, SUPRA THE NEXT POINT PLAINTIFF WILL SHOW IS HOW CHAPTER 91 HAPA IS APPLICABLE TO THE HIGH SECURITY FACILITY.

IF THE MOVING PARTY MEETS ITS BURDEN, THEN THE OPPOSING PARTY MAY NOT DEFEAT A MOTION FOR SUMMARY JUDGEMENT IN THE ABSENCE OF ANY SIGNIFICANT PROBATIVE EVIDENCE TENDING TO SUPPORT HIS LEGAL THEORY. *COMMODITY FUTURES TRADING COMM'N VS. SAVAGE*, 611 F.2D 270, 282 (9TH CIR. 1979). THE OPPOSING PARTY CANNOT STAND ON HIS PLEADINGS, NOR CAN HE SIMPLY ASSERT THAT HE WILL BE ABLE TO

DISCREDIT THE MOVANT'S EVIDENCE AT TRIAL. SEE *T.W. ELECTRICAL*, 809 F.2D AT 630. SIMILARLY, LEGAL MEMORANDA AND ORAL ARGUMENT ARE NOT EVIDENCE AND DO NOT CREATE ISSUES OF FACT CAPABLE OF DEFEATING AN OTHERWISE VALID MOTION FOR SUMMARY JUDGEMENT. *BRITISH AIRWAYS BD. VS. BOEING CO.*, 585 F.2D 946, 952 (9TH CIR. 1978), CERT. DENIED 440 U.S. 981 (1979). MOREOVER, "IF THE FACTUAL CONTEXT MAKES THE NONMOVING PARTY'S CLAIM IMPLAUSIBLE, THAT PARTY MUST COME FORWARD WITH MORE PERSUASIVE EVIDENCE THAN WOULD OTHERWISE BE NECESSARY TO SHOW THAT THERE IS A GENUINE ISSUE FOR TRIAL." *FRANCISCAN CERAMICS*, 818 F.2D AT 1468, CITING *MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. V. ZENITH RADIO CORP.*, 475 U.S. 574, 587, 106 S.CT. 1348, 1356 (1986).

THE STANDARD FOR A GRANT OF SUMMARY JUDGEMENT REFLECTS THE STANDARD GOVERNING THE GRANT OF A DIRECTED VERDICT. SEE *EISENBERG V. INSURANCE CO. OF NORTH AMERICA*, 815 F.2D 1285, 1289, CITING, *ANDERSON V. LIBERTY LOBBY, INC.*, 477 U.S. 242, 250, 106 S.CT. 2505, 2512 (1986). THUS, THE QUESTION IS WHETHER "REASONABLE MINDS COULD DIFFER AS TO THE IMPORT OF THE EVIDENCE." *ID.*

HOWEVER, WHEN "DIRECTED EVIDENCE" PRODUCED BY THE MOVING PARTY CONFLICTS WITH "DIRECT EVIDENCE" PRODUCED BY THE PARTY OPPOSING SUMMARY JUDGEMENT, "THE JUDGE MUST ASSUME THE TRUTH OF THE EVIDENCE SET FORTH BY THE NONMOVING PARTY WITH RESPECT

TO THAT FACT." *T.W. ELECTRICAL*, 809 F.2D AT 631. ALSO, INFERENCES FROM THE FACTS MUST BE DRAWN IN THE LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY. *ID.* INFERENCES MAY BE DRAWN BOTH FROM UNDERLYING FACTS THAT ARE NOT IN DISPUTE, AS WELL AS FROM DISPUTED FACTS WHICH THE JUDGE IS REQUIRED TO RESOLVE IN FAVOR OF THE NON-MOVING PARTY. *ID.*

SEGREGATION AND MAXIMUM CONTROL PROGRAM

PLAINTIFF OBJECTS TO THE MAGISTRATE MISCONSTRUING PLAINTIFF'S CHALLENGE TO THE DEFENDANTS' SEGREGATION AND MAXIMUM CONTROL PROGRAM OR S.M.C.P. PLAINTIFF HAS NOT AND DOES NOT CHALLENGE HIS "PLACEMENT" AT AND WITHIN THE HIGH SECURITY FACILITY. THEREFORE, THIS COURT SHOULD NOT CONSIDER THE ISSUE THAT IS BEING SOLD TO THIS COURT REGARDING "PLACEMENT".

PLAINTIFF IS TALKING ABOUT TREATMENT; OF HOW THE DEFENDANTS HAVE HIM SUBJECTED TO: AN INVALID RULE WHICH IS PER SE THE S.M.C.P.; OF HOW THE DEFENDANTS SUBJECT PLAINTIFF, ARBITRARILY, TO AN [sic] BEHAVIOR MODIFICATION PROGRAM, WHICH, THEY ARE NOT QUALIFIED TO DESIGN THIS TYPE OF BEHAVIOR MODIFICATION PROGRAM; AND THAT VARIOUS ASPECTS OF THIS S.M.C.P. RUN AFOUL TO THE CONSTITUTIONAL RIGHTS OF PLAINTIFF.

THE MAGISTRATE ERRED IN CONCLUDING PLAINTIFF IS CHALLENGING HIS "PLACEMENT". THUS, THE WHOLE ARGUMENT FROM PAGE 5 TO PAGE 10 IS MISPLACED AND INAPPROPRIATE.

THE CLOSEST PART THAT PLAINTIFF FEELS THE MAGISTRATE IS APPROACHING AN ISSUE THAT PLAINTIFF PRESENTS IS THAT PART WHERE PLAINTIFF CONTENDS THAT THE S.M.C.P. IS A RULE THAT GOVERNS THE ENTIRE FACILITY, AND AS A RULE THAT GOVERNS AN ENTIRE FACILITY, SUCH "RULE" MUST BE MADE IN ACCORDANCE WITH CHAPTER 91 OF THE HAWAII ADMINISTRATIVE PROCEDURE ACT OR "HAPA". THE MAGISTRATE PRESENTS AN ARGUMENT TO THIS ISSUE ON PAGE 20 OF HIS "R AND R".

IN SECTION "D" THE MAGISTRATE CONTENDS THAT PLAINTIFF, "FOR THE FIRST TIME," CHALLENGES THE OPERATION OF THE FACILITY ON THE BASIS THAT THE MANNER IN WHICH IT IS RUN IS A "RULE" UNDER STATE LAW WHICH WAS NOT ADOPTED PURSUANT TO HAPA. THIS IS ABSOLUTELY UNTRUE. IN PLAINTIFF'S AMENDED COMPLAINT, THIS COURT WILL FIND THAT ON PAGE 13 UNDER "CLAIMS" (B) THAT HE STATES PERFECTLY CLEAR:

"DEFENDANTS FORCED UPON PLAINTIFF THEIR BEHAVIOR MODIFICATION PROGRAM THAT WAS NOT APPROVED BY THE GOVERNOR [sic] OF THE STATE OF HAWAII AS REQUIRED BY STATE LAW IN ORDER TO HAVE THE 'FORCE AND EFFECT OF LAW' IN ORDER TO BE VALID" . . .

OBVIOUSLY, THAT MAGISTRATE DID NOT READ CAREFULLY PLAINTIFF'S AMENDED COMPLAINT. INSTEAD THE MAGISTRATE MERELY REITERATE'S [sic] THE DEFENDANTS CONTENTION CITING THE SAME CASE LAW. HOWEVER, THE MAGISTRATE'S RULING ON THIS ISSUE COVERS "A HORSE OF A DIFFERENT COLOR", PAY ABSOLUTELY NO ATTENTION TO THE FACTUAL CIRCUMSTANCES SURROUNDING THIS CASE, WHICH IS SEPARATE FROM THE CASES PRESENTED IN *TAI VS. CHANG*, 570 P.2D 563 (1977); *HOLDMAN VS. OLIM*, 581 P.2D 1164 (1978); AND *AH HO VS. COBB*, 673 P.2D 1030 (1983).

TAI, SUPRA, IS A CASE THAT DEALT WITH AN UNPUBLISHED RULE RELATING TO TRANSFER. THE INMATE IN *TAI*, TOOK UP CHALLENGE TO REGULATIONS CONCERNING ONLY THE INTERNAL MANAGEMENT OF AN AGENCY. *HOLDMAN*, SUPRA, CHALLENGED A CORRECTIONS "DIRECTIVE". CF. *AH HO*, SUPRA.

AS CITED IN FOOTNOTE 8 IN *WILDER*, SUPRA, THE HAWAII LEGISLATURE SPECIFICALLY MANDATED THE CREATION OF A "HIGH SECURITY FACILITY". SEE HAW.REV.STAT. § 353-1.2 (1985). THE COURT IN *WILDER*, STATED THAT [FOR THE PURPOSES OF INSTITUTIONS] THAT A FACILITY IS AN AGENCY AS DEFINED BY CHAPTER 91 OF HAPA. THUS, AS THE S.M.C.P. IS A "RULE" WITHIN THE MEANING OF CHAPTER 91 AND THAT CHAPTER 91 [HAPA] IS APPLICABLE TO THE [HIGH SECURITY] FACILITY, CURRENT SETTLED CASE LAW - DEALING SPECIFICALLY WITH THE ISSUES PRESENTED HEREIN -

HOLDS THAT "RULES" [IN THE CONTEXT OF INSTITUTIONS] WITHIN THE MEANING OF RELEVANT STATUTES APPLY TO RULES GOVERNING A FACILITY. *WILDER, SUPRA*.

THE NEXT QUESTIONS [sic] THAT SHOULD BE RESOLVED IS EVEN ASSUMING ARGUENDO THAT THE S.M.C.P. IS AN INVALID "RULE", AS DEFINED BY STATUTES, AND ENFORCED THUS, ILLEGALLY AT THE HIGH SECURITY FACILITY, DOES PLAINTIFF HAVE A STATE-CREATED LIBERTY INTEREST IN NOT BEING SUBJECTED TO AN INVALID "RULE"?

PLAINTIFF CONTENDS THAT HE HAS A STATE-CREATED LIBERTY INTEREST IN NOT BEING SUBJECTED TO AN INVALID "RULE". THE POINTS OF PLAINTIFF'S CONTENTION THAT HE HAS A STATE-CREATED LIBERTY INTEREST ARE AS FOLLOWS:

1. CHAPTER 91 OF HAPA § 91-7(B) STATES: . . . "THE COURT SHALL DECLARE THE RULE INVALID IF IT FINDS IT VIOLATES THE CONSTITUTIONAL OR STATUTORY PROVISIONS OR EXCEEDS THE STATUTORY AUTHORITY AND WAS ADOPTED WITHOUT COMPLIANCE WITH STATUTORY RULE-MAKING PROCEDURE.";

2. TITLE 17 § 17-200-1; AND

3. CHAPTER 91 OF HAPA; AND

4. HAW.REV.STAT. 353-3.

IT IS CLEAR THAT NOT EVERY STATE STATUTE OR REGULATION CREATES A LIBERTY INTEREST. ONLY IF A STATUTE OR REGULATION LIMITS THE DISCRETION OF STATE OFFICIALS BY PROVIDING

THAT THEY "MAY" OR "MUST" TAKE SOME ACTION ONLY UNDER CERTAIN PRESCRIBED CIRCUMSTANCES DOES THE STATUTE OR REGULATION CREATE A LIBERTY INTEREST OR "ENTITLEMENT". *HEWITT VS. HELMS*, 459 U.S. 460, 466, 103 S.CT. 864, 871 (1983) ("THE REPEATED USE OF EXPLICITLY MANDATORY LANGUAGE IN CONNECTION WITH REQUIRING SPECIFIC SUBSTANTIVE PREDICATES DEMANDS A CONCLUSION THAT THE STATE HAS CREATED A PROTECTED LIBERTY INTEREST"); *TOUSSAINT VS. MCCARTHY*, 801 F.2D 1080, 1089 (9TH CIR. 1986), *CERT. DENIED*, 107 S.CT. 2462 (1987).

IN THE CASE-AT-BAR, IT IS INDISPUTABLE THAT EITHER IN COMBINATION TO EACH OTHER OR STANDING ALONE, THE FOUR POINT CITATIONS OF STATUTES AND REGULATIONS, *SUPRA*, SET FORTH THE PROCEDURES TO BE FOLLOWED WHEN PROMULGATING RULES. IN SHORT THE DEFENDANTS DISCRETION ARE LIMITED IN MAKING RULES GOVERNING THEIR FACILITY BY PROVIDING THAT THE RULES IS SUBJECT TO THE APPROVAL OF THE GOVERNOR AND DIRECTOR. *SEE I.E. TITLE 17 § 17-200-1*. THUS, PLAINTIFF CONTENDS THAT DEFENDANTS OKU AND SHOHEI VIOLATED PLAINTIFF'S STATE-CREATED LIBERTY INTEREST IN BEING FREE FROM RULES THAT ARE NOT MADE IN ACCORDANCE WITH CHAPTER 91 OF HAPA E.G. RULES WHICH GOVERN A FACILITY.

FINALLY, THE MAGISTRATE CONTENDS THAT THIS ISSUE IS NOT ONE THAT MAY BE APPROPRIATELY RESOLVED BY THIS COURT. THE FEDERAL COURT DOES NOT HAVE THE JURISDICTION TO

ENFORCE A STATE LAW OR RULE UNLESS A FEDERAL RIGHT IS BEING VIOLATED. OBVIOUSLY, BY NOW IT IS CLEAR THAT PLAINTIFF'S STATE-CREATED LIBERTY INTEREST WAS VIOLATED, THUS, LIBERTY INTERESTS ARE FEDERALLY PROTECTABLE UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION PER THE FOURTEENTH AMENDMENT.

FURTHERMORE, THIS COURT IS BOUND BY THE STATE LEGISLATURES DICTATION OF RULE-MAKING PROCEDURE AND THE JUDGEMENTS OF THE HAWAII STATE SUPREME COURT PURSUANT TO 28 U.S.C.A. § 1738. *PIATT VS. MACDOUGALL*, 773 F.2D 1032 (9TH CIR. 1985). THIS COURT HAS JURISDICTION BECAUSE CHAPTER 91 § 91-7(B) DOES NOT LIMIT A DECLARATION OF THE RULE INVALID TO STATE COURTS, IT STATES: "THE COURT SHALL" . . . AND EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT PROTECTS EVEN PRISONERS FROM BEING DISCRIMINATED FROM RELIEF OF ARBITRARY GOVERNMENT CONDUCT.

[MATERIAL DELETED]

RETALIATION

PLAINTIFF OBJECTS TO THE MAGISTRATE'S R AND R REGARDING RETALIATION. THE MAGISTRATE CLAIMS THAT HIS COMPLAINT HAS VAGUELY AND CONCLUSORILY CLAIMED THAT DEFENDANTS HAVE "RETALIATED" AGAINST HIM IN VIOLATION OF UNSPECIFIED RIGHTS.

TO THE CONTRARY PLAINTIFF'S CLAIM OF RETALIATION IS CLEAR, WHICH IS, THAT VARIOUS DEFENDANTS RETALIATED AGAINST PLAINTIFF BECAUSE OF HIS WORK AS A JAIL HOUSE LAWYER. RETALIATION BY PRISON OFFICIALS AGAINST JAIL HOUSE LAWYERS HAS LONG BEEN A VIOLATION OF THE INMATES FEDERALLY PROTECTED RIGHTS UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION. *SEE BRIDGES VS. RUSSELL* 757 F.2D 1155 (11TH CIR. 1985) WHERE IT WAS FOUND THAT PRISON OFFICIALS MAY NOT RETALIATE FOR PRISONERS' EXERCISE OF PERMISSIBLE FIRST AMENDMENT FREEDOMS.

PRISON INMATES RETAIN FIRST AMENDMENT RIGHTS WHICH DO NOT CONFLICT WITH LEGITIMATE PENAL OBJECTIVES. *SEE PELL VS. PROCUNIER*, 417 U.S. 817, 94 S.CT. 2800 (1974); *PROCUNIER VS. MARTINEZ*, 416 U.S. 396, 94 S.CT. 1800 (1974); *DAVIDSON VS. SCULLY*, 694 F.2D 50 (2ND CIR. 1982).

THUS, IT IS CLEAR THAT PLAINTIFF'S RETALIATION CLAIM IS NOT VAGUE AND THAT THE VIOLATIONS ARE IN DONE [sic] AGAINST PLAINTIFF'S FIRST AMENDMENT RIGHT.

THEREBY, THERE IS A MATERIAL FACT WHICH CANNOT BE RESOLVED AT THIS POINT, WHICH IS, WAS THE ACTIONS OF THE NAMED DEFENDANTS DONE FOR THE PURPOSE OF RETALIATING AGAINST PLAINTIFF BECAUSE OF HIS CHOICE TO EXERCISE HIS RIGHT TO SEEK REDRESS FROM GOVERNMENT?

THE MAGISTRATE CLAIMS THAT PLAINTIFF'S CLAIMS OF RETALIATION ARE NOT SUPPORTED. ON

THE CONTRARY, THE INFERENCES FROM THE DEFENDANTS', WHOM ARE ACCUSED OF RETALIATION, SILENCE ON WHETHER OR NOT THEY CONDUCTED THEMSELVES AGAINST PLAINTIFF TO VIOLATE HIS FIRST AMENDMENT RIGHT TO SEEK GOVERNMENT REDRESS OF HIS GRIEVANCES, ARE AN INDICATION THAT THE [sic] IS SOME CREDIBILITY TO PLAINTIFF'S CLAIMS. THE DEFENDANTS DO NOT DISPUTE PLAINTIFF'S CLAIMS. INSTEAD THEY ERRONEOUSLY CONSTRUE PLAINTIFF'S CLAIMS AS VAGUE AND CONCLUSORY.

IT MUST BE REMEMBERED THAT INFERENCES FROM THE FACTS MUST BE DRAWN IN THE LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY. *T.W. ELECTRICAL, INC. VS. PACIFIC ELECTRICAL CONTRACTORS ASS'N*, 809 F.2D 626, AT 631.

TAKE FOR INSTANCE THE EXAMPLE THE MAGISTRATE USED TO SHOW THAT PLAINTIFF'S CLAIM[S] IS VAGUE AND CONCLUSORY. HE STATES: . . . "IN HIS COMPLAINT AT PARAGRAPH 41 HE STATES THAT DEFENDANT SEQUEIRA RETALIATED AGAINST HIM WHEN DEFENDANT SEQUEIRA TOLD PLAINTIFF, IN A GRIEVANCE RESPONSE, ON JUNE 23, 1987, "YOUR BEHAVIOR PREDICATES ADVANCEMENT TO MODULE 'B'." THE MAGISTRATE GOES FURTHER TO DISPUTE PLAINTIFF [sic] CLAIM BY STATING:

(ACCORDING TO PLAINTIFF, HE HAD "HELD A VIRTUAL POSITIVE BEHAVIOR SINCE HIS ARRIVAL TO HHSF IN SEPTEMBER 3, 1985." THIS OF COURSE IS

NOT TRUE. HOWEVER, PLAINTIFF DOES NOT DISPUTE THAT HE PLEADED GUILTY TO ASSAULTING ANOTHER INMATE ON JANUARY 1, 1987.)

FIRST OF ALL, PLAINTIFF'S CONTENTION THAT, "HE HELD A VIRTUAL POSITIVE BEHAVIOR SINCE HIS ARRIVAL TO HHSF IN SEPTEMBER 3, 1985.", IS A FACT! SEE EXHIBIT "C" ATTACHED TO DEFENDANTS MOTION FOR SUMMARY WHERE THIS COURT WILL FIND - AS PLAINTIFF STATED - THAT THERE ARE ONLY ONE MISCONDUCT FILED AGAINST PLAINTIFF WITHIN THE DATE OF PLAINTIFF'S ARRIVAL TO HHSF, WHICH IS, SEPTEMBER 3, 1985 AND AUGUST 28, 1987, WHERE HE WAS FOUND GUILTY OF MISCONDUCT AND THAT IS ON JANUARY 1, 1987.

JUST ONE SINGLE MISCONDUCT, AND UNLIKE THE MAGISTRATE'S CLAIM PLAINTIFF DID NOT PLEAD GUILTY TO ASSAULT, HE PLEAD GUILTY TO FIGHTING! SEE EXHIBIT "J" ATTACHED TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT.

PLAINTIFF SAID "VIRTUAL" BECAUSE HE KNEW THAT BETWEEN THOSE DATES CITED HE WAS FOUND GUILTY OF ONE MISCONDUCT. NOW, TO FURTHER PROVE THAT PLAINTIFF DID HOLD A "VIRTUAL" POSITIVE BEHAVIOR: PLAINTIFF REFERS THIS COURT TO THE ENTRIES LISTED ON EXHIBIT "C", SUPRA, BETWEEN SEPTEMBER 3, 1985 AND AUGUST 28, 1987. THEY ARE:

1.) SEPTEMBER 3, 1985: ADMITTED TO HHSF ON INTAKE PLACEMENT STATUS PENDING ASSESSMENT;

- 2.) SEPT. 5, 1985: PLACED IN MODULE "A"
- 3.) OCT. 1, 1985: TRANSFERRED TO MODULE B DUE TO HOUSING SHORTAGE
- 4.) OCT. 18, 1985: RELIGIOUS COUNSELING APPROVED ON FRIDAYS WITH HARRY FUJIHARA;
- 5.) DEC. 5, 1985: APA: APPROVED FOR RELIGIOUS COUNSELING WITH MR. CHEE AND MR. SOUZA EVERY THURSDAY, EXCLUDING HOLIDAYS, FROM 9:15AM TO 10AM;
- 6.) RECLASSIFICATION: S-5/MAX.; (DEC. 13, 1985)
- 7.) MAR. 7, 1986: APA - TRANSFER TO MODULE C;
- 8.) MAR. 7, 1986: APA - PLACED ONTO MODULE C FLOOR BOY WORKLINE;
- 9.) APRIL 17, 1986: APA - TRANSFERRED FROM MODULE C FLOORBOY TO KITCHEN WORKLINE;
- 10.) AUGUST 1986: APPROVED FOR BIBLE CORRESPONDENCE COURSE;
- 11.) DEC. 13, 1986: RECLASSIFICATION: REMAIN AT S-5/MAX.;
- 12.) JAN. 15, 1987: MISCONDUCT - PLEAD GUILTY TO CHARGE INCURRED ON JAN. 1, 1987;
- 13.) JAN. 30, 1987: END OF SEGREGATION PLACED ON PHASE ONE;
- 14.) FEB. 9, 1987: *EARLY REVIEW* ON PHASE I. PLACED IN GENERAL POPULATION OF MODULE A;

- 15.) FEB. 20, 1987: RELIGIOUS COUNSELING APPROVED WITH HENRY CHEE;
- 16.) APRIL 28, 1987: MISCONDUCT REPORT - *FINDINGS - NOT GUILTY*;
- 17.) AUGUST 25, 1987: MISCONDUCT (ISSUE OF ORIGINAL COMPLAINT IN THIS CASE AND AMENDED)

WITH SEVENTEEN ENTRIES ALL POSITIVE SAVE ONE GUILTY FINDING OF MISCONDUCT AND THE MAGISTRATE SAYS PLAINTIFF'S "VIRTUAL" CLAIM IS UNTRUE. THE FACTS SPEAK FOR THEMSELVES! EVEN IN THE CASE OF THE JAN. 15, 1987 ENTRY PLAINTIFF *ACCEPTED* RESPONSIBILITY FOR HIS ACTIONS - A POSITIVE POSITION! HE EVEN RECEIVED AN EARLY REVIEW OF HIS PHASE I STATUS AFTER ONLY NINE DAYS (MOST PEOPLE STAY AT LEAST 30 DAYS ON PHASE I) AND TRANSFERRED TO MODULE A! PLAINTIFF MUST HAVE BEEN DOING SOMETHING RIGHT.

YET, FOR ALL HIS POSITIVE BEHAVIOR, DEFENDANT SEQUEIRA HINDERED PLAINTIFF'S ADVANCEMENT THOUGH THE PHASES ONLY BECAUSE OF HIS BEHAVIOR? DEFENDANT SHOHET'S AFFIDAVIT ATTACHED AS EXHIBIT "E" TO PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT CLEARLY STATE:

"... WHEREBY INMATES DEMONSTRATING SATISFACTORY ADJUSTMENT MOVE UP TO THE NEXT PHASE AND GAIN GREATER PRIVILEGES . . . HIS PROGRESS IS BASED UPON HIS BEHAVIOR WHICH

DETERMINES HOW RAPIDLY OR SLOWLY HE MOVES THROUGH THE SYSTEM." . . . (PAGE 2)

THUS, WITH DISCOVERY OF OTHER INMATE CASES BETWEEN JAN. 1, 1987 AND THE DATE OF DEFENDANT SEQUEIRA'S RESPONSE TO PLAINTIFF IN THE GRIEVANCE, PLAINTIFF BELIEVES THAT HE WOULD BE ABLE TO SHOW THAT HIS RECORD IN H.H.S.F. UP UNTIL THAT POINT WAS BETTER THAN THOSE INMATES WHO WERE ADVANCED TO THE NEXT HIGHER LEVEL OF THE PROGRAM. PLAINTIFF WOULD ALSO SHOW THAT NONE OF THOSE INMATES WHO WERE ADVANCED WERE "GRIEVANCE WRITERS", WHICH PLAINTIFF HAD BECOME WHILE IN SEGREGATION FOR THE JAN. 1, 1987, MISCONDUCT. THUS, SHOWING THAT DEFENDANT SEQUEIRA'S RESPONSE WAS DIRECTED TO PLAINTIFF'S EXERCISE OF HIS FIRST AMENDMENT RIGHT TO FILE GRIEVANCES AGAINST PRISON OFFICIALS, WHICH HE WAS INCREASINGLY DOING. AND LIKE OTHER JAILHOUSE LAWYERS, PLAINTIFF WAS "KEPT BACK" FROM ADVANCEMENT FOR ARBITRARY REASONS.

PLAINTIFF IS NOT SAYING HE HAS A RIGHT TO ADVANCE. HE IS SAYING THAT ACCORDING TO DEFENDANTS OWN RULES HE COULD NOT BE KEPT BACK IF HIS BEHAVIOR WAS "SATISFACTORY". DEFENDANT SEQUEIRA'S MOTIVES WERE RETALIATORY.

BUT, PLAINTIFF RECEIVED NO DISCOVERY. THE MAGISTRATE SUSPENDED DISCOVERY PENDING SUMMARY JUDGEMENT. THUS, PLAINTIFF IS NOT

PREPARED TO DEFEND SUMMARY JUDGEMENT ON THIS ISSUE OF RETALIATION AS HE NEEDS TO UNDER GO DISCOVERY TO DRAW A CONTINUOUS CONNECTION BETWEEN EACH DEFENDANT TO SHOW BY PREPONDERENCE [sic] OF EVIDENCE THAT: 1.) A CONSPIRACY TO HARASS/RETALIATE AGAINST PLAINTIFF FOR HIS JAILHOUSE LAWYER ACTIVITIES EXISTS AND/OR THAT EACH DEFENDANT THOUGH NOT CONSPIRING TOGETHER, DID RETALIATE AGAINST PLAINTIFF ON THEIR OWN - BECAUSE OF HIS WORK AS A JAILHOUSE LAWYER. THEREBY, BECAUSE OF THE COMPLEXITY OF THIS "RETALIATION" ISSUE AND BASED ON THE FOREGOING, THIS COURT SHOULD DENY DEFENDANTS SUMMARY JUDGEMENT ON THIS ISSUE AND REMAND FOR DISCOVERY.

REMAINING ISSUES PRESENTED IN SUMMARY JUDGEMENT

PLAINTIFF OBJECTS TO EVERY OTHER ISSUES [sic] PRESENTED IN SUMMARY JUDGEMENT THAT THE MAGISTRATE RECOMMENDS IN FAVOR OF DEFENDANTS. HE OBJECTS BASED ON THE FOLLOWING REASONS:

- 1.) THE MAGISTRATE'S REPORT AND CONTENTIONS ARE ERRONEOUS;
- 2.) THAT PLAINTIFF, BECAUSE OF THE LACK OF SUFFICIENT TIME TO PREPARE AN ADEQUATE OBJECTION, CANNOT SUFFICIENTLY RESPOND TO

ALL OTHER ISSUES RAISED ON SUMMARY JUDGEMENT. SEE AFFIDAVIT OF DeMONT R.D. CONNER ATTACHED.

ISSUES NOT RAISED IN SUMMARY JUDGEMENT

THERE ARE STILL OTHER ISSUES THAT HAVE NOT BEEN DEALT WITH IN SUMMARY JUDGEMENT. PLAINTIFF DOES NOT ABANDON THEM AND REQUESTS THIS COURT TO ORDER MAGISTRATE TO SET THOSE ISSUES ON A COURSE FOR TRIAL.

OTHER OBJECTION

PLAINTIFF OBJECTS TO THIS COURT'S RECENT ORDER MANDATING THAT PLAINTIFF FILE HIS OBJECTIONS BY JUNE 10, 1991. THIS IS NOT ENOUGH TIME AS PLAINTIFF DOES NOT HAVE OPEN ACCESS TO LAW LIBRARY AND XEROXING AT "ANY TIME HE WANTS". THE DEFENDANTS HAVE RULES AND SET SCHEDULES THAT THEY STICK BY AND PLAINTIFF WAS MANDATED BY MAGISTRATE TOKAIRIN TO FILE A RESPONSE TO HIS ORDER BY JUNE 5, 1991 OR HE WOULD DISMISS PLAINTIFF'S PETITION IN CONNER VS. OKU, CIVIL NO. 87-410ACK. THUS, PLAINTIFF WAS SWAMPT [sic] IN LOADS OF PAPERWORK, WITH LITTLE RESOURCES [sic] TO WORK WITH.

PLAINTIFF SHOULD NOT BE HELD TO THE STRICT STANDARDS OF AN ATTORNEY AS ATTORNEYS HAVE ACCESS TO LAW LIBRARY AND XEROXING AT THEIR FINGER TIPS AND THEY MAY-AT-WILL EMPLOY THE SERVICES OF OTHER ATTORNEYS.

PLAINTIFF HAS NONE OF THESE. NEITHER DOES PLAINTIFF HAVE THE EDUCATION OF ATTORNEYS. HE IS A LAY-MAN WITH A NOW 11.5 GRADE AVERAGE, NOTWITHSTANDING HIS DIPLOMA. HE NEEDS AT LEAST ENOUGH TIME TO MAKE COPIES OF HIS OBJECTIONS. AS A RESULT THIS IS THE ONLY COPY/ ORIGINAL. HE WILL SEND IT TO THE COURT AS IS BECAUSE HE IS UNDER ORDER TO FILE HIS OBJECTIONS BY JUNE 10, 1991.

DATED: HONOLULU, HAWAII, JUNE 6, 1991.

/s/ DeMont R.D. Conner
DeMONT R.D. CONNER,
PRO SE
99-902 MOANALUA HWY.
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No. 98-1911

FILED

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In The
Supreme Court of the United States
October Term, 1994

CINDA SANDIN, *Unit Team Manager,*
Halawa Correctional Facility,

Petitioner,

vs.

DeMONT R.D. CONNER, *et al.,*

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S BRIEF

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QUESTION PRESENTED

Whether a maximum security state prison inmate who is not subject to a loss of good time credit, nor to any necessary impact on parole, but who "may be" subjected to disciplinary segregation for violation of prison rules, has a "liberty interest" in avoiding disciplinary segregation solely because state prison disciplinary rules require a disciplinary committee to find "substantial evidence" of a rule infraction before deciding whether and to what extent to order the inmate segregated?

PARTIES TO THE PROCEEDING

Petitioner Cinda Sandin was, at the times relevant to this proceeding, a Unit Team Manager at Halawa Correctional Facility, Department of Corrections, State of Hawaii. She appears in this Court in her official and individual capacities. Petitioner was one of sixteen state prison officials sued by Respondent DeMont R.D. Conner in the amended complaint in the District Court in Civil No. 88-0169 (D. Haw. am. comp. filed Sept. 8, 1989) (J.A. 169-90). She is the only official left in the litigation with respect to Respondent Conner's procedural due process claim in connection with an August 28, 1987, disciplinary hearing, Pet. App. A8-A9, and Ms. Sandin is the only Petitioner.

Respondents include DeMont R.D. Conner, who at all times was and is serving a thirty-years-to-life prison sentence in the Hawaii state penal system, formerly administered by the Department of Corrections, and which is now administered by the Department of Public Safety, State of Hawaii. *See* Haw. Rev. Stat. §§ 353-1 *et seq.* (1985 & Supp. 1992). Other respondents are Theodore Sakai, acting Administrator, Department of Corrections; Harold Falk, Director of Corrections, and various employees of Halawa Correctional Facility, *i.e.*, Lawrence Shohet, Corrections Supervisor; William Oku, Administrator; Leonard Gonsalves, Chief of Security; Francis Sequeira, Unit Team Manager; and Adult Corrections Officers William Summers, Robert Johnson, Gordon Furtado, Abraham Lota, Edward Marshall, William Paaga, and Brian Lee. Also named as Defendant below, and as a

PARTIES TO THE PROCEEDING – Continued

Respondent here, is Dr. Kim Thorburn, a medical officer with responsibility for Halawa facility. Also a Defendant below and a Respondent here is the State of Hawaii. The State and each of the officer respondents have an interest in the outcome of (and support) Ms. Sandin's petition and brief, and are named as nominal respondents only pursuant to S. Ct. R. 12.4. All of the officer respondents are named, as below, in their official and in their individual capacities.

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No. 93-1911

In The
Supreme Court of the United States
October Term, 1994

CINDA SANDIN, *Unit Team Manager,*
Halawa Correctional Facility,
Petitioner,
vs.

DeMONT R.D. CONNER, *et al.,*
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S BRIEF

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, entered February 2, 1994, is reported at 15 F.3d 1463 (9th Cir. 1994), and is reprinted in Appendix ("Pet. App.") "A" to the Petition for Certiorari. The initial opinion of the Court of Appeals, entered June 2, 1993, is reported at 994 F.2d 1408 (9th Cir. 1993). The order and judgment of the District Court from which appeal was taken by Respondent Conner are unreported and are printed at Pet. App. "C" and "D." The report and recommendation of the Magistrate Judge, to

whom Petitioner's motion for summary judgment originally was referred, is reprinted in the Joint Appendix ("J.A.") at 325.

JURISDICTION

The original opinion of the United States Court of Appeals for the Ninth Circuit was entered June 2, 1993, *see* Pet. App. A1, and a timely petition for rehearing and suggestion of the appropriateness of rehearing *en banc* was filed June 16, 1993. *See* Joint Appendix ("J.A.") 18. On February 2, 1994, the Ninth Circuit issued an amended opinion, but did not dispose of the petition for rehearing. *Id.* On February 25, 1994, the Court of Appeals denied the petition for rehearing and rejected the suggestion for *en banc* review. Pet. App. "E." The time in which the Petition for Certiorari was required to be filed extended to and included May 26, 1994, and the Petition was timely filed by mail on that day under this Court's Rule 29. Jurisdiction is invoked here pursuant to 28 U.S.C. § 1254(1).

Jurisdiction in the United States District Court for the District of Hawaii was alleged to have been conferred by 28 U.S.C. § 1343(3). Jurisdiction to review the final judgment entered in the District Court in favor of all Defendants lay in the United States Court of Appeals pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL, STATUTORY, AND ADMINISTRATIVE PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides in relevant part that:

[No State shall] deprive any person of life, liberty, or property, without due process of law.

Chapter 201, Title 17, of the Hawaii Administrative Rules, subchapter 2 of which governed the adjustment process at Halawa Correctional Facility at all times relevant to this litigation, and which continues in force, has been printed in its entirety in the appendix to this Brief ("Br. App."), as have been parts of Chapter 353, Haw. Rev. Stat., as amended, and Hawaii Administrative Rules bearing upon the powers of the Department of Public Safety, as well as those of the Hawaii Paroling Authority regarding the granting of parole to Hawaii prisoners.

The Halawa Correctional Facility Special Needs Facility Maximum Custody Inmate Guidelines ("Max I"), which became effective on June 16, 1994, after the Petition for Certiorari was filed in this case, are reprinted, *infra*, Br. App. 48a-71a.

STATEMENT OF THE CASE

A. Introduction.

In *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), this Court held that a prison's rules that permitted, but did not mandate, denial of visitation privileges under certain circumstances did not create a "liberty interest" in receiving visitors. *Id.* at 464. In response

to the request of thirty-one States' Attorneys General, the Court found it was unnecessary to create a "bright line" rule "that prison regulations, regardless of the mandatory character of their language, or the extent to which they limit official discretion, 'do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement.'" *Id.* at 461 n.3. "Inasmuch as a 'bright line' of this kind [was] not necessary for a ruling in favor of petitioners," the Court "refrain[ed] from considering it at this time," "express[ing] no view on the proposal and leav[ing] its resolution for another day." *Id.* at 462 n.3.

This case concerns not merely the due process implications of visitation with those *outside* the prison, who are presumed innocent, but the ability of prison officials to segregate inmates within the prison for violation of disciplinary rules. Here, where the need to be free of intrusive federal review is at its height, the Ninth Circuit has held that Hawaii prison rules create a "liberty interest" in avoiding "disciplinary segregation" without more. Hawaii does not grant "good time" credits, and even the most serious disciplinary finding has no necessary impact upon parole. The main issue here is whether Hawaii's prison rules, which authorize, but do not require, the imposition of disciplinary segregation, create a federally protected "liberty interest" under the Due Process Clause solely because those regulations require, as a matter of state law, "substantial evidence" of misconduct before a disciplinary committee is mandated to consider whether to order the inmate to be segregated on the basis of his or her alleged misconduct.

B. Background of the Litigation.

1. The Role of Segregated Housing in Hawaii's Halawa Correctional Facility.

Like other States and the federal Government, the Fiftieth State has created a multi-tiered system of penal institutions. *See* Haw. Rev. Stat. §§ 353-6, -7, -8 (Supp. 1992). This system, consisting of conditional release centers, community correctional centers, and a high security correctional facility, *id.*, seeks to achieve the penal law's dual goals of retribution and rehabilitation, cognizant of "the 'ever-present potential for violent confrontation and conflagration' " that is present in any penal system,¹ and the State's duty to " 'take reasonable measures to guarantee the safety of the inmates.' " ²

Halawa Correctional Facility ("Halawa" or "HCF"), located in central Oahu, is the only maximum security correctional facility in the Hawaii penal system. By law, Halawa is charged with providing "extensive control and correctional programs for categories of persons who cannot be held or treated in other correctional facilities," including "[i]ndividuals committed because of serious predatory or violent crimes against the person"; "intractable recidivists"; "[p]ersons characterized by varying degrees of personality disorders"; "[r]ecidivists identified with organized crime"; and "[v]iolent and dangerously deviant persons." Haw. Rev. Stat. § 353-7(b)(1) (1985 &

¹ *Whitley v. Albers*, 475 U.S. 312, 321 (1986) (quoting *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977)).

² *Farmer v. Brennan*, 114 S. Ct. 1970, 1976 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)).

Supp. 1992). Because of Halawa's function, even inmates in "general population" at HCF are isolated in their cells for significant periods each day. In the period at issue in this case,³ for example, those inmates in the least-restrictive category at the facility were in "lockdown" from 2

³ The precise structure of inmate privileges in general population, protective custody, administrative segregation, and disciplinary segregation, that obtains at the present time at HCF is not reflected by the record, in that the "Segregation and Maximum Control Program" ("SMCP"), see Exhs. "36," "60," and "61," Clerk's Record ("CR") 58, J.A. 125-90, is no longer in effect at Halawa. The Department of Public Safety, however, has not foresworn its discretion to re-employ the SMCP in the future, and for this reason, the issues raised by that program, and, specifically, the contention that the assignment of non-disciplinary segregation inmates to virtually the same conditions of confinement, destroys any "liberty interest" that inmates may have in avoiding "disciplinary segregation," even if disciplinary segregation may be ordered by the prison adjustment committee only upon a finding of "substantial evidence" of misconduct, *infra* pp. 45-47, is not moot. See *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982). In any case, this sub-issue is not moot because HCF maintains classification categories, *i.e.*, "Maximum Custody I," in which inmate privileges are as severely limited as those under "Phase I" of the SMCP. Cf. *Schall v. Martin*, 467 U.S. 253, 256 n.2 (1984), and Br. App. 48a-71a. The procedures and regulations concerning inmate classification, see Haw. Admin. R. § 17-201-1, moreover, remain the same. In addition, inmate prerogatives under the SMCP "Phase I" classification are of continued relevance to the instant case, in that the Ninth Circuit's judgment reopens Respondent's claim for damages. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 n.6 (1983). Indeed, even equitable relief pertaining to the SMCP remains an issue in that a finding that respondent's Due Process rights were violated could give rise to claims for prospective relief expunging the misconduct finding at issue in this case, which was made in August, 1987.

pm to dinnertime, and from 10 pm to breakfast, and were subject to numerous restrictions when allowed out of their cells. J.A. 125-41. Those in the next restrictive category – inmates assigned to "Module 'A'" – were locked down from 2 pm to 6 pm, and from 10 pm to 10 am. J.A. 126. The next most restrictive category – known at the time as "Phase I" – included inmates housed in the Special Holding Unit ("SHU"), which consisted of single-man cells. J.A. 142-55. The Special Holding Unit also housed inmates in categories known as "Protective Custody," see Haw. Admin. R. § 17-201-23, "Administrative Segregation," see *id.* § 17-201-22, and "Disciplinary Segregation," see *id.* § 17-201-19(c).⁴

Conditions in the Special Holding Unit were admittedly "virtually" "one and the same" for inmates confined either to "Phase I" or "disciplinary segregation," Resp. Aff. ¶ 18 (CR 49), J.A. 84. The only significant difference in privileges between inmates in "Phase I" and "Disciplinary Segregation" was that the latter could generally receive one less non-legal telephone call and one less family visit per month period. See *id.*; see also CR 58, Exhs. "60," "61," J.A. 142-55, 156-68.⁵

⁴ See CR 27 (mem. at 3 n.2), J.A. 58 n.2 (admitting "[t]he special holding unit houses inmates on disciplinary[,] phase one, administrative segregation, and protective custody."). "Phase I" is analogous presently to a classification category known as "Maximum Custody I." See Br. App. 48a-71a.

⁵ The process for assigning inmates to disciplinary segregation, therefore, was (and remains) only one of the procedures for "regulating the internal management of Hawaii correctional facilities." Haw. Admin. R. § 17-200-3, Br. App. 2a. Moreover, placement of Halawa inmates in the SHU, under circumstances virtually identical to those suffered by those

Indeed, all inmates in the Special Holding Unit were subject to numerous restrictions. All were subjected to lock-down except for one sixty-minute exercise period, five times per week, J.A. 152, 166, one ten minute shower, five times per week, J.A. 152, 166, law library, J.A. 142, 156, official (legal) and permitted family visits, J.A. 149-50, 163-64, court proceedings, and medical and religious needs that could not be met in the Unit. See J.A. 142-43, 156-57, 300-16. Only one Unit inmate at a time was allowed out of his cell, see J.A. 142, 156, and all Special Holding Unit inmates were not only subjected to strip-searches upon their departure and return from the unit, see J.A. 143, 157, but required to wear leg irons and waist chains at all times while out of their cells, see J.A. 143, 157. Televisions, radios, tape recorders, and other electronic entertainment devices were banned, see J.A.

ordered to disciplinary segregation, as a matter of general classification procedures, administrative segregation, or protective custody, has at all times been unquestionably discretionary. Hawaii's classification rule, Haw. Admin. R. § 17-201-2, Br. App. 29a, for example, has remained virtually the same since this Court decided in *Olim v. Wakinekona*, 461 U.S. 238 (1983), that application of the then-existing classification rule (see Exh. "F" to CR 83, J.A. 243-48), to effect an inter-state transfer did not implicate a "liberty interest." 461 U.S. at 248-51. Likewise, Hawaii's administrative segregation rules permit segregation "[w]hensoever the facility administrator or a designated representative" "determines that there is reasonable cause to believe that the inmate or ward is a threat to" "[l]ife or limb," "[t]he security or good government of the facility," or "[t]he community," or "[w]hensoever any similarly justifiable reasons exist." Haw. Admin. R. § 17-201-22(2), (3), Br. App. 25a; cf. *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983). Protective custody can be ordered whenever "there is reason to believe that such action is necessary[.]" Haw. Admin. R. § 17-201-23(a), Br. App. 25a-26a.

144, 158, and inmates were subjected to numerous restrictions on possession of other materials, *id.* at 145-49, 159-62. Inmates relocated to the SHU typically were not permitted to attend otherwise scheduled programs, due to the special security concerns in the Unit. See J.A. 306. Cf. HCF Maximum Custody Inmate Guidelines, Br. App. 48a-71a.

2. The Hawaii Penal System's Internal Disciplinary Process.

At the time relevant here, and continuing today, Halawa facility inmates have been governed by a disciplinary system that consists of Hawaii's general criminal laws and an "adjustment process" administered by the prison itself. See *infra* Br. App. 4a-24a. The "main purpose" of the latter process, as the Hawaii Supreme Court has held, is "summarily maintaining prison order." *State v. Alvey*, 67 Haw. 49, 55, 678 P.2d 5, 9 (1984).

a. The Adjustment Process and Its Lack of Impact on an Inmate's Term of Confinement.

Under the "adjustment process," prison administrators have defined a variety of "prohibited acts," categorizing them as to their severity. "Misconduct" is categorized as "greatest misconduct," "high misconduct," "moderate misconduct," "low moderate misconduct," and "minor misconduct." Br. App. 7a, 8a, 10a, 13a, 14a. The maximum punishment for the most serious misconduct is "[d]isciplinary segregation up to sixty days," or "[a]ny other sanction other than disciplinary segregation." Haw. Admin. R. § 17-201-6(b), Br. App. 8a. The

"other sanctions" to which the administrative rule refers include loss of privileges, such as access to non-legal mail or the commissary, but do not include any sanction that lengthens an inmate's term of incarceration. Hawaii does not employ any system of "good time" credits, and the Hawaii State Paroling Authority is free to ignore a record of misconduct in granting parole. See Haw. Rev. Stat. §§ 353-68, 353-69 (1985). Parole may be granted "at any time after the prisoner has served the minimum term of imprisonment fixed according to law," *id.* § 353-68, and so long as "it appears to the Hawaii paroling authority that there is a reasonable probability that the prisoner concerned will live and remain at liberty without violating the law and that the prisoner's release is not incompatible with the welfare and safety of society," *id.* at § 353-69. Accordingly, while "[p]arole may be denied to an inmate when the Authority finds" "[t]he inmate has been a management or security problem in prison as evidenced by the inmate's misconduct record," see Haw. Admin. R. § 23-700-33(b), Br. App. 44a, the Authority is never bound to deny parole on the basis of such a finding. Likewise, the Paroling Authority is not bound to grant parole upon finding that the inmate has *not* been "a management or security problem in prison," or even upon a finding that all other factors, on which a denial of parole may be predicated, are absent. Cf. *Board of Pardons v. Allen*, 482 U.S. 369, 374 (1986) (contrary statute).

b. The Discretion to "Convict" Under the Adjustment Process.

In the event an inmate is accused of a "serious rule violation," which includes any accused violation that

carries with it a possible penalty of "segregation for longer than four hours," Haw. Admin. R. § 17-201-12, Br. App. 16a, the prison convenes an "adjustment committee," which, in relevant respect, "shall" make "[a] finding of guilt" where: "(1) the inmate or ward admits the violation or pleads guilty," or "(2) the charge is supported by substantial evidence." Haw. Admin. R. § 17-201-18(b), Br. App. 21a. The prison rules make no precise specification of when the adjustment committee "shall" make "[a] finding of innocence"; indeed, the regulations make no reference to such sorts of findings at all. While therefore authorizing an adjustment committee to "convict" on proof that is less convincing than "substantial evidence," the prison regulations also fail to specify that any sanction issue upon a finding of guilt. After a finding of guilt, "[t]he adjustment committee may render sanctions commensurate with the gravity of the rule and the severity of the violation," *id.* § 17-201-19, Br. App. 22a. The committee need not impose any sanctions upon the prisoner. In addition, even if the regulations were viewed to constrain the discretion of the *committee* to order an inmate to segregation, the regulations do not constrain the authority of the warden (known as a "facility administrator") to order discipline:

The facility administrator may . . . initiate review of any adjustment committee decision and it shall be within the administrator's discretion to modify any committee findings or decisions. The administrator may [r]emand any matter to the adjustment committee for further hearing or rehearing if the administrator believes it to be in the interest of justice.

Haw. Admin. R. § 17-201-20(b), Br. App. 24a. No burden of proof rule (nor any other requirement) constrains the Administrator's discretion, and therefore an inmate can have no expectation of "acquittal" if there is neither "substantial evidence" of misconduct nor a confession.

3. Inmate Conner's Placement at Halawa Facility, the Incident of August 13, 1987, and Subsequent Prison Disciplinary Proceedings.

Respondent DeMont R.D. Conner is a Hawaii state prisoner who, at all relevant times, was serving a thirty-years-to-life sentence for convictions, entered in the Hawaii state courts, on two counts of attempted murder, five counts of kidnapping, three counts of robbery in the first degree, four counts of burglary in the first degree, seven counts of rape, sodomy, sexual abuse, or assault (in varying degrees), attempted escape, and various driving offenses. *See* J.A. 209-33. After being placed initially upon conviction at Oahu Community Correctional Center on April 23, 1984, Conner was transferred on September 3, 1985, to HCF, having been found guilty in disciplinary proceedings during the interim period of attempted escape, use of force or threats of force against staff members or their families, assault (two counts), refusal to obey orders (two counts), lying or providing false information, use of abusive or obscene language to a staff member, and harassment of prison employees. *See* J.A. 234-36.

On August 13, 1987, Conner, while housed at HCF, was charged with a variety of misconducts based upon

the following reports of Adult Corrections Officer Gordon Furtado:

On Thu. Aug. 13, 1987, at approx. 0900 hrs. I ACO G. FURTADO while on duty in Module A along with ACO R. AHUNA escorted INMATE D. CONNER from his cell (quad II) to the module program area. At this time I informed inmate CONNER to move against the wall to be strip-searched before leaving the module. Inmate CONNER then stripped, faced the wall and squatted. I then asked inmate CONNER to put both hands on the wall and lift up both feet one at a time to which he did with no incident.

I then asked him to step back, bend over and with both hands spread his buttocks so that I could check for contraband in the rectal area to which he said "Fuck!" in an angry tone of voice. This part of the search was thus completed, but as Inmate CONNER turned around and faced this writer he stared at me and stated "Why are you harassing me?" I informed him that I'm just following a routine procedure. He then stated in a very sarcastic voice "What you got something personal against me! Why you harassing me?" I then told him all you have to do is just listen and follow what I tell you to do but Inmate CONNER just kept on making sarcastic remarks about being harassed and the way that this writer was doing his job.

At this time because of the tense atmosphere and also the very provoking attitude towards this writer, Sgt. SUMMERS who witnessed this incident canceled Inmate CONNER's privilege of religious counselling. Inmate CONNER was then escorted back to his cell by this writer and ACO D. COELHO.

It should be noted that as Inmate CONNER went through the strip search procedures he moved very slow and questioned every move as if trying to hinder the search, hoping that this writer might overlook a certain area. Inmate CONNER appeared to be very unruly in his attitude toward this writer.

Exh. "K" to CR 83, Pet. App. A61-A62. Conner was given notice of the charges, and the opportunity to contest them before an adjustment committee. The Committee concluded that Conner had "use[d] physical interference or obstacle resulting in the obstruction, hindrance, or impairment of the performance of a correctional function by a public servant" (a high misconduct); "us[ed] abusive or obscene language to a staff member"; and engaged in "[h]arassment of employees" (the latter both low-moderate misconducts). Pet. App. A66. The Committee, in its August 31, 1987, disposition of the charges, gave the following as its contemporary statement for its decision:

The Committee based their decision upon the inmate's statements that during the strip search procedure he turned around after squatting and looked at the ACO. He was then directed to "spread his cheeks" by ACO Furtado as part of the new strip search procedure. He felt angry, humiliated and apprehensive. He then "eyed up" ACO Furtado and was hesitant to comply. He further indicated that he dislikes ACO Furtado and feels he should not work on the module. The inmate admitted saying the word "fuck" during the procedure. The Committee also reviewed the submitted reports. Witnesses were unavailable due to move to the medium facility and being short staffed on the modules.

Exh. "K" to CR 83, Pet. App. A66. Conner was ordered by the Committee to serve 30 days in disciplinary segregation on the "high misconduct" charge, and eight hours in such segregation, to be served concurrently, on the two low-moderate misconduct charges. Pet. App. A67. Conner was ordered to commence his time in disciplinary segregation on August 31, 1987, *id.*, and served the full thirty days in the Special Holding Unit. On a review initiated pursuant to the appeal processes set forth at Haw. Admin. R. § 17-201-20(a), Deputy Administrator Henry Pikini found, on May 16, 1988, that the "high misconduct" charge was "inappropriate" under the facts of Conner's case, and "order[ed] that all references to a finding of guilt in this charge be expunged." Exh. "K" to CR 83, J.A. 249. The findings of guilt on the low-moderate misconduct charges remain on Conner's record.

C. Proceedings Below.

1. Proceedings in the District Court.

Before Deputy Administrator Pikini could act, but after Conner served his time in disciplinary segregation, Conner filed the instant lawsuit, *pro se*, in the United States District Court for the District of Hawaii on March 10, 1988, against Petitioner Cinda Sandin, who served as Chairman of the August, 1987, prison Adjustment Committee, as well as other officials, alleging a variety of defects in the committee process, including the allegedly improper denial of witnesses. CR 1, J.A. 23. Even before the lawsuit was served and answered, the District Court held that "due process" was required for "major misconduct" hearings, CR 3, J.A. 25 (order granting *in forma*

pauperis application). After an amended complaint was filed (CR 9, J.A. 27) naming additional defendants (J.A. 27-28), Defendants answered with a general denial and the defenses that the complaint and amended complaint failed to state a claim upon which relief can be granted, as well as qualified immunity, sovereign immunity, and the statute of limitations. CR 16, J.A. 30-31. Conner thereafter filed an affidavit accusing solely "Defendant Cinda Sandin" of "violat[ing] my right to due process when she denied me the right to question the correctional officer whom had written me up[.]" CR 22, J.A. 41. The District Court then issued a writ of habeas corpus *ad testificandum* and directed Defendants to respond to Conner's previously-filed motions for preliminary injunctions asking, somewhat ironically, that Conner be placed *back* in the Special Holding Unit as a matter of "protective custody" in order to prevent "alleged harassment by prison officials." CR 24, J.A. 43. Defendants' responded, *see* CR 26, J.A. 45-55, and ultimately the Magistrate Judge, after an evidentiary hearing, found that Conner "has failed to provide any specific reasons to justify action in separating Plaintiff from any staff members, and his claims of harassment are vague." CR 29, J.A. 62.⁶ The District

⁶ The Magistrate also rejected claims for equitable relief on hitherto unpled Eighth Amendment claims, finding that these problems "have been corrected for the most part," and that Conner otherwise had not shown an entitlement to equitable relief. J.A. 64. The Magistrate recommended, however, that Defendants be required to grant Conner greater access to the law library, and materials for gaining access to the Courts. *Id.* at 63-64.

Court, Kay, J., adopted the Magistrate's report and recommendation. CR 36, J.A. 66-71.

With leave of Court, CR 56, J.A. 97, Conner filed a second amended complaint, challenging various aspects of his conditions of confinement under the First and Eighth Amendments, and raised procedural due process challenges against Sandin's actions that allegedly "refused Plaintiff his right to question the charging A.C.O. who wrote me up," among other claims. CR 60, J.A. 169-90; *see id.* at ¶ 43. After Defendants moved for summary judgment on the ground, among others, that Conner's "placement did not affect a liberty interest subject to audit under the due process clause," CR 83, J.A. 199, Conner failed to raise any specific argument or evidence in opposition to summary judgment with respect to the issues surrounding the August, 1987, disciplinary hearing. *See* CR 90, J.A. 250-78. The Magistrate then recommended, CR 110, J.A. 325-52, and the District Court then granted, CR 115, Pet. App. A21-38, without elaboration, summary judgment on Conner's claims pertaining to the disciplinary hearing.⁷ CR 116, Pet. App. A39. Conner appealed.

⁷ Prior to granting summary judgment, the District Court rejected Conner's claim that Defendants were in contempt of the preliminary injunction's mandates regarding "access to the Courts." The Magistrate found "Defendants have taken reasonable steps to comply with the PI in good faith and have, in fact, substantially complied with its terms," and the District Judge adopted this recommendation." CR 108, J.A. 317, 324.

2. Proceedings in the Court of Appeals

The Ninth Circuit, in a published opinion by Judge Reinhardt, joined by Judges Browning and Norris, reversed and remanded in part. Pet. App. "A." In relevant provision,⁸ the panel concluded that "Conner had a liberty interest, protected by the fourteenth amendment, in not being arbitrarily placed in disciplinary segregation." *Id.* at A3. To reach this conclusion, the panel relied entirely upon the "substantial evidence" provision of the prison rules. The Court found that the rule mandates "freedom from disciplinary segregation" if "the inmate does not admit guilt," and "the committee does not find substantial evidence," and thus "provide[s] explicit standards that fetter official discretion." *Id.* at A4. Then, "[h]aving found that Conner possessed a liberty interest in not being confined to disciplinary segregation," the

⁸ In a portion of the decision not challenged by Petitioner or the remaining Defendants, the Ninth Circuit struck down, on procedural grounds, the application of the prison rule barring communication in a language other than English to what inmates asserted was Islamic prayer. *See* Pet. App. A9-A12. Because the Ninth Circuit did not forbid the prison to proscribe acts susceptible of communicative effects in languages other than English, *see id.* at A11 n.9, left open the issue of qualified immunity, *id.* at A12, and affirmed the grant of qualified immunity in related cases, *see Smith v. Elkins*, No. 93-15185 (9th Cir. Mar. 2, 1994), and State officials repealed the rule at issue on the "Islamic prayer" claim, certiorari was not sought as to the specific issues implicated by the Ninth Circuit's ruling pertaining to Conner's alleged claim "that his first and fourteenth amendment rights were violated when prison officials punished him for praying aloud in Arabic." *See* Pet. App. A9.

panel found, despite Conner's own incriminating statements, that Petitioner had not sufficiently demonstrated "the adequacy of its justification for denying an inmate the right to present witnesses." *Id.* at A8. The Court reversed the summary judgment, even as to claims for monetary relief against Petitioner, stating that "[t]he right to call witnesses at a disciplinary hearing has been clearly established since *Wolff v. McDonnell* [418 U.S. 539 (1974)], was decided[.]" *Id.* at A9. Although the Court, on a timely petition for rehearing, reinstated summary judgment for Defendants on other claims, it ultimately reversed and remanded the grant of summary judgment "as to Conner's claim regarding disciplinary segregation." *Id.*; *see also id.* at A18.

SUMMARY OF ARGUMENT

1. The Ninth Circuit's intrusive order subjecting every assignment to disciplinary segregation in the Hawaii penal system to "Due Process" protection defeats Hawaii's fundamental interest in "summarily maintaining prison order," *State v. Alvey*, 67 Haw. 49, 55, 678 P.2d 5, 9 (1984), and, without significant justification in logic or policy, adds not only an unnecessary, but a harmful, layer of federal review of prison management decisions, in derogation of precepts of federalism and general deference to prison managers in the area of maintaining good order and security. *E.g., Rhodes v. Chapman*, 452 U.S. 337, 349 n.14 (1981).

a. There simply is no support in precedent for the recognition of "liberty interests" with respect to an

assignment to disciplinary segregation under any circumstances when such an assignment carries with it no loss of good time credits, and no necessary impact on parole. The Due Process Clause, standing alone, does not yield any "justifiable expectation" that an inmate will "be incarcerated [even] in any particular State," *Olim v. Wakinekona*, 461 U.S. 238, 245 (1983), and this Court has never even intimated, except in *dicta*, that the risk of disciplinary segregation, *simpliciter*, could even trigger an analysis of a prison's rules for "substantive predicates" and "mandatory outcomes" that could give rise to a federally protected "liberty interest." See, e.g., *Hewitt v. Helms*, 459 U.S. 460, 472-78 (1983). Indeed, the Court has expressly reserved the question whether "prison regulations, regardless of the mandatory character of their language or the extent to which they limit official discretion, 'do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement.'" *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 461 n.3 (1990). This Court can, and should, answer that question, and reverse on that basis.

b. As a general matter, assignment to disciplinary segregation is only one option, along a continuum, employed by prison administrators to maintain good order and security at the Nation's prisons. Accordingly, the process of subjecting prison regulations governing matters of privileges and segregation to "liberty interest" analysis, once begun, cannot be logically limited. The appropriate dividing line for purposes of "liberty interest" analysis is whether a disciplinary finding subjects an inmate to a loss of good time credits, or a necessary

impact on parole. Only in such instances does the prisoner's interest have "real substance and is sufficiently embraced within Fourteenth Amendment 'liberty'" to trigger federally-mandated procedures, and concomitant judicial review. *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Because "deprivations imposed in the course of the daily operations of an institution are likely to be minor compared to the release from custody at issue in parole decisions and good time credits," and because "the safe and efficient operation of a prison on a day-to-day basis has traditionally been entrusted to the expertise of prison officials," *Hewitt*, 459 U.S. at 470, the Court should adopt a "bright-line" rule reversing the judgment here, regardless of any "mandatory" aspect of the Hawaii rules. Numerous States, like Hawaii, have structured certain disciplinary rules authorizing segregation in a way that does not affect good time credit or parole, and this Court should support these experiments by removing, in this limited and principled way, the burden of intrusive federal Due Process "liberty interest" review. Review of disciplinary findings where there is no loss of good time credit or necessary impact on parole should be left to the state courts. See *Paul v. Davis*, 424 U.S. 693 (1976); cf. *Albright v. Oliver*, 114 S. Ct. 807, 818-19 (1994) (Kennedy, J., joined by Thomas, J., concurring in the judgment).

2. The Court, in any event, should reverse the judgment of the Ninth Circuit on the narrower ground that Hawaii's rules relating to disciplinary segregation do not create "liberty interests" under any reading of this Court's Due Process caselaw, despite the "burden of proof" language of Haw. Admin. R. § 17-201-18(b), which states: "[a] finding of guilt shall be made where" "[t]he

inmate or ward admits the violation or pleads guilty" or "[t]he charge is supported by substantial evidence."

a. At a minimum, because Hawaii's rules fail to specify that segregation must be ordered upon a finding of guilt, Hawaii's rules fail to generate the sort of "mandatory" outcome required by *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 464. Thompson's "two-way" mandatory outcome requirement is a sound one in the context of evaluating whether "liberty interests" are created in the prison context, and should be enforced here. See *Hewitt*, 459 U.S. at 470.

b. In any event, the Ninth Circuit fundamentally misconstrued § 17-201-18(b), as creating a mandate to acquit under certain circumstances, when the regulation's plain language creates only a mandate to convict if "substantial evidence" is present. Because of the broad discretion to order "disciplinary action" despite the lack of "substantial evidence" of misconduct, Conner simply had no "legitimate claim" to avoid disciplinary segregation. See *Thompson*, 490 U.S. at 460.

c. The Court of Appeals also erred in overlooking the provisions of Haw. Admin. R. § 17-201-20(b), which provides that the facility administrator (warden) "may . . . initiate review of any adjustment committee decision and it shall be within the administrator's discretion to modify any committee findings or decisions." This broad language, which contains no limits on the evidence the administrator may consider, the scope of modifications he may make, or the reasons he may entertain for such modifications, confers "unfettered discretion," see *Olim v.*

Wakinekona, 461 U.S. 238, 249-50 (1983), which bars the conclusion that a "liberty interest" has been conferred.

d. The foregoing conclusions are reaffirmed by the fact that, in this context, the "burden of proof" rule invoked by the Ninth Circuit is, at most, procedural, and "an expectation of receiving process is not, without more, a liberty interest." *Olim*, 461 U.S. at 250 n.12.

3. The record independently supports reversal in that Conner could have been, and was on other occasions, assigned to virtually the identical conditions of confinement pursuant to the "classification" process, which is governed by rules nearly identical to those at issue in *Olim*, *supra*, where no "liberty interest" was found. See Haw. Admin. R. §§ 17-201-1 and -3 (Br. App. 2a-4a), and 461 U.S. at 242 & n.1. Any federal ability Conner had to avoid placement in the Special Holding Unit as a matter of disciplinary segregation was ousted by "the remaining field of discretion," *Wallace v. Robinson*, 940 F.2d 243, 248 (7th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1563 (1992). Given that discretion, Conner's only interest is in avoiding the reputational impact of a disciplinary finding. This is not an interest protected under the Due Process Clause. See *Paul v. Davis*, 424 U.S. 693 (1976).

4. Notwithstanding the limited grant of certiorari, however the Court decides the "liberty interest" issue, it should overturn the Ninth Circuit's reversal, despite the doctrine of qualified immunity, of the District Court's judgment barring damages against Petitioner. Given the grant of certiorari on the "liberty interest" question, the

denial of immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), is "plain error." See *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). At a minimum, the Court should vacate the Ninth Circuit's judgment and remand for further consideration of the immunity issue.

ARGUMENT

The Ninth Circuit's Far-Reaching Ruling that Any Threatened Assignment to Disciplinary Segregation in Hawaii's Penal System Triggers Federally-Imposed Due Process Requirements is Contrary to This Court's Decisions, Defies Logic and Constitutional Principle and Policy, and Ignores the Broad-Ranging Deference this Court Has Recognized is Owed to State Prison Officials in Matters of Prison Security.

- I. The Ninth Circuit's Decision That the Interest in Avoiding Disciplinary Segregation Could Ever Give Rise to a Federally Protected Liberty Interest Qualitatively Expands Federal Control Over State Prison Management in a Manner Which this Court Has Never Approved, and in Contradiction of Basic Principles of Institutional Deference and Comity that Inform this Court's Jurisprudence.

Although purporting merely to give federal "effect" to Hawaii's prison rules concerning disciplinary segregation, the Ninth Circuit's decision in this case could not more fundamentally undermine the "main purpose" of those regulations, namely "summarily maintaining prison order." *State v. Alvey*, 67 Haw. 49, 55, 678 P.2d 5, 9 (1984). Indeed, the Ninth Circuit's "final" determination – more than six years after the fact – that a federal defect possibly

lay in Halawa facility's treatment of inmate Conner with respect to the August, 1987, disciplinary decision, constitutes a classic instance "of ongoing oversight of a state program," marred by "extensive" "federal intrusion" and "[d]uplication of effort, inconvenience, and uncertainty." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 122 n.32 (1984) (citing *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943)). In launching the lower federal courts on the mission of policing every assignment to disciplinary segregation in Hawaii's prisons, the Ninth Circuit, even on its own assumptions about state law, failed to appreciate just how far its decision departs from the confines of this Court's precedents.

At the outset, it is important to stress what the Ninth Circuit's decision does not do. The exacting federal review of prison disciplinary records required by the Ninth Circuit's decision does not – and cannot – serve to restore "good time" credits,⁹ or compel or even necessarily affect, parole.¹⁰ Such review does not rid Hawaii's prisons of unsafe environmental conditions,¹¹ or deter violence against inmates, either from errant correctional officers,¹² or from other inmates;¹³ nor does it serve to protect the important but limited First Amendment rights

⁹ Compare *Wolff v. McDonnell*, 418 U.S. 539 (1974), with *Ponte v. Real*, 471 U.S. 491 (1985).

¹⁰ See *Board of Pardons v. Allen*, 482 U.S. 369 (1987); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979).

¹¹ See *Helling v. McKinney*, 113 S. Ct. 2475 (1993); *Wilson v. Seiter*, 501 U.S. 294 (1991).

¹² See *Hudson v. McMillian*, 112 S. Ct. 995 (1992).

¹³ See *Farmer v. Brennan*, 114 S. Ct. 1970 (1994).

inmates enjoy despite their incarcerated status.¹⁴ Nor does it even protect state inmates from irrational and arbitrary assignments to disciplinary segregation. After all, even without procedural Due Process protections, inmates would be entitled under Equal Protection analysis to treatment that meets minimum rationality,¹⁵ and, *a fortiori*, would be protected from assignment to segregation status on the basis of race, sex, national origin, religion, or alienage.¹⁶

No doubt in light of these considerations, this Court has studiously avoided any concrete holding that could be viewed as supporting the proposition that an assignment of a state convict to disciplinary segregation, *simpliciter*, can ever implicate a "liberty interest" under the due process clause. As stated in *Montanye v. Haynes*, 427 U.S. 236 (1976), "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison

¹⁴ See *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Turner v. Safley*, 482 U.S. 78 (1987); cf. *Churchill v. Waters*, 114 S. Ct. 1878 (1994) (anti-retaliation). See also the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993).

¹⁵ See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448, 450 (1985) ("mere negative attitudes" and "irrational prejudice" cannot be the basis to sustain state action).

¹⁶ See *id.* at 453 (Stevens, J., joined by Burger, C.J., concurring) (noting "virtually automatic invalidation of racial classifications" and "differing results in cases involving classifications based on alienage, gender, or illegitimacy").

authorities to judicial oversight." *Id.* at 242. "The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in any of its prisons." *Meachum v. Fano*, 427 U.S. 215, 224 (1976). The Due Process Clause, standing alone, does not yield any "justifiable expectation" that an inmate will "be incarcerated [even] in any particular State." *Olim v. Wakinekona*, 461 U.S. 238, 245 (1983).

Recognizing this, the Ninth Circuit grounded its decision in the belief that "a liberty interest in not being confined to disciplinary segregation" was "created by state law." Pet. App. A3, A4. The panel relied on *Hewitt v. Helms*, 459 U.S. 460 (1983), and *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1990), but neither of those decisions warrant the expansive interpretation given them by the Court of Appeals.

Although, in *Hewitt*, the Court stated that a liberty interest had been created by Pennsylvania's rules governing administrative detention, the Court ultimately found that no Due Process violation had been shown. See 459 U.S. at 472-78. *Hewitt's* statements that the State had "created a protected liberty interest" are thus *dicta*, and "[i]t is the holdings of [the Court's] cases, rather than their dicta, that we must attend." *Kokkonen v. Guardian Life Insurance Co.*, 114 S. Ct. 1673, 1676 (1994) (Scalia, J., for a unanimous Court).

Similarly, in *Thompson*, the Kentucky Department of Corrections, and the Attorneys General of more than thirty states, urged the Court "to adopt a rule that prison regulations, regardless of the mandatory character of their language or the extent to which they limit official

discretion, 'do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement.' " 490 U.S. at 455 n.4, 461 n.3.

In *Thompson*, the Court was able to avoid accepting this general and sensible proposition only because it found that the prison regulations and procedures regarding visitation "lack[ed] the requisite relevant mandatory language." *Id.* at 465. "Inasmuch as a 'bright line' " suggested by the Attorneys General "[wa]s not necessary for a ruling in favor of petitioners," the Court "refrain[ed] from considering it at this time," and "le[ft] its resolution for another day." *Id.* at 462 n.3.

Indeed, the Court has consistently refused to decide whether "the degree of 'liberty' at stake in loss of privileges" ever triggers Due Process, and "thus whether some sort of procedural safeguards are due when only such 'lesser penalties' are at stake." *Baxter v. Palmigiano*, 425 U.S. 308, 323 (1976).

As an analysis of the Hawaii penal regulations in this case shows, *see supra* pp. 5-9, no meaningful line can be drawn between "privileges" and "segregation." Inmates in virtually all penal institutions are on "lockdown" for part of the day, and the difference between "segregation" and "general population" modules is defined largely by the extent of "privileges" that are made available to the inmates. Indeed, penological justifications and social policy to one side, longer showers, more extensive outdoor recreation, more frequent visits with family, or greater access to books, newspapers, television, radio, or recorded music, are undoubtedly for many inmates

(indeed for most objective observers), more important than having the "opportunity" to socialize face-to-face with fellow maximum security convicts in a "general population" module. The enduring irony of Due Process claims challenging imposition of disciplinary segregation lies in the frequency of arguments by inmates in general population units who claim that conditions there, by reason of overcrowding, violate the Eighth Amendment, as enforced by the Due Process Clause's substantive reach. *See Rhodes v. Chapman*, 452 U.S. 337 (1981); *cf. Farmer v. Brennan*, 114 S. Ct. 1970 (1994) (inmate claiming that placing him into general population violated his rights under Eighth Amendment). Respondent Conner is no exception, for at the very time he was challenging his August, 1987, placement into disciplinary segregation, he was demanding a federal judicial order placing him *back* in the SHU under the rubric of "protective custody."

In fact, *Wolff v. McDonnell*, 418 U.S. 539 (1974), the leading case in this area, and its progeny, make clear this Court's strong reluctance to subject prison regulations that have no necessary impact on good time credits or parole to a "liberty interest" inquiry. In *Wolff*, Nebraska created a scheme for the forfeiture of good-time credits, without providing Due Process protections. The Court analyzed "the process due," and ordered equitable relief. The Court did so, however, only after finding that, because "the State ha[s] created the right to good time and itself recogniz[ed] that its deprivation is a sanction authorized for major misconduct," "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those

minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Id.* at 557. Thus, although the Court's opinion in *Wolff* contains *dicta* to the effect that "it would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue," 418 U.S. at 539 n.19, the recent decisions of this Court since *Wolff* have characterized *Wolff* as involving a loss of good-time credits only. See, e.g., *Heck v. Humphrey*, 114 S. Ct. 2364, 2370 (1994) ("*Wolff* involved a challenge to the procedures used by state prison officials to deprive prisoners of good-time credits"); *Thompson*, 490 U.S. at 461 (describing *Wolff* as involving solely "good-time credits"); *Hewitt*, 459 U.S. at 460 ("in *Wolff*, *supra*, we were dealing with good-time credits which would have actually reduced the period of time which the inmate would have been in the custody of the government").¹⁷ *Hewitt* stresses:

¹⁷ In *Wright v. Enomoto*, 462 F. Supp. 397 (N.D. Cal. 1976), *summarily aff'd*, 434 U.S. 1052 (1978), the Court summarily affirmed a decision requiring federally-imposed procedures prior to the placement of inmates in "maximum security" units at San Quentin, Folsom, Soledad, and Tracy penitentiaries in California. The District Court was presented, in that case, with uncontradicted evidence that inmates were placed in "maximum security" cells, which had no "fresh air or daylight" whatsoever, and were "poor[ly]" ventilated and lit, "for months, even years, without hope of release," either "for no reason at all," or for reasons indicating that the prison administrators were engaging in purposeful racial discrimination against Mexican-American inmates. See 462 F. Supp. at 400-01, 404. Compare *Haw. Admin. R. § 17-201-19(c)-(h)* (conditions in segregated housing). Given that the remedies imposed by the *Wright* court

The deprivations imposed in the course of the daily operations of an institution are likely to be minor when compared to the release from custody at issue in parole decisions and good-time credits. Moreover, the safe and efficient operation of a prison on a day-to-day basis has traditionally been entrusted to the expertise of prison officials, see *Meachum v. Fano*, *supra*, at 225. These facts suggest that regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to "liberty," different from statutes and regulations in other areas.

459 U.S. at 470.

The Ninth Circuit's expansion of Due Process requirements into a domain that this Court has carefully avoided for more than twenty years is more than significant doctrinally. It has enormous practical consequences for the States, for the judicial system, and for the inmates themselves. As this Court has observed in the parole

could have been justified by the undisputed risk of "permanent psychological, if not, indeed, physical, damage," to inmates in the unit, *cf. Vitek v. Jones*, 445 U.S. 480, 493 (1980), by the strong inference of race discrimination, *cf. Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), or by the apparent total irrationality of the placements into maximum security, *cf. Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), *Wright* has, at best, limited impact on this case, where the District Court repeatedly found the conditions of confinement to be adequate, Conner either did not appeal from these findings or was rebuffed on appeal, and there was ample evidence justifying the rationality of the sanction. See *Wisconsin Department of Revenue v. Wrigley Co.*, 505 U.S. ____ n.2 (1992). For the reasons developed in this Brief, moreover, *Wright* is wrong and the Court should not feel constrained to follow it here. See generally *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1975).

context, the leveraging of privileges conferred pursuant to state law into "liberty interests" distorts the incentives for States even to attempt to confer those benefits, lest they find themselves embroiled in extensive constitutional litigation over the wording of prison regulations, and, if a "liberty interest" is found, over the particulars of compliance with Due Process requirements in specific cases. To borrow from this Court's language in *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 13 (1979), if disciplinary determinations "are encumbered by procedures that states regard as burdensome and unwarranted, they may abandon or curtail" the privileges that are gained by avoiding discipline. Hawaii, after all, could assign *every* inmate convicted of one of a specified set of felonies to solitary confinement for the entirety of their sentences, and avoid extensive federal procedural Due Process review. Expansive "federalization" of "liberty interests" with respect to disciplinary segregation decisions therefore has a significant potential to thwart "salutary development" of penological programs and "desirable experimentation" by the States. See *Hewitt*, 459 U.S. at 471.

Moreover, the specific "liberty interest" problem posed by this case is not limited to Hawaii. Although many States do employ good time credit, and do make loss of good time credit a potential consequence of an inmate's violation of prison rules, the vast majority of States have either created categories of misconduct that can never lead to a loss of good time credit,¹⁸ left it

¹⁸ It appears that only in Minnesota, Rhode Island, and South Carolina does a misconduct finding always lead to a loss of good-time credit. See Minn. Dep't of Corrections Inmate Dis. Reg. (1988); R.I. Dep't of Corrections Op. Mem. 1.18.02 at 16

within the discretion of prison administrators to determine whether good time should be forfeited,¹⁹ or both. In

(Sept. 1, 1994); S.C. Dep't of Corrections Inmate Guide at 7. Pennsylvania, like Hawaii, has no good time credits, and at least the following States have categories of prisoner misconduct that cannot lead to a loss of good time credits: California (see 15 Cal. Code of Regulations (Barclays) § 3314(d) (1988)); Georgia (see Ga. Bd. of Corrections Rules § 125-3-2.08(a) (1990)); Idaho (see Idaho Dep't of Corrections Policy and Proc. Man. § 318-C, Attachment "A" at 7 (Idaho has abolished good time credits for persons convicted after 1986)); Illinois (see Tit. 20, Ch. 1, Subch. e, Ill. Dep't of Corrections Rules 401-02); Indiana (see Ind. Dep't of Correction Adult Disciplinary Policy Procedures § 30 (1990)); Kentucky (see Ky. Corrections Policies & Proc. 15.2 at 2-3, 8-9 (1992)); Maryland (see Md. Div. of Correction Reg. No. 105-1 at 8 (sentencing matrix) (deprivation of good time credits not available for inmates with specified previous good conduct records)); Missouri (see Mo. Dep't of Corrections Inmate Rule Handbook at 18 and Mo. Dep't of Corrections Institutional Services Policy & Proc. Man. No. IS19-1.1 (June, 1994) (Attachments "A" and "B")); Nevada (see Nev. Dep't of Prisons Code of Penal Disc. 28 (1993)); New York (see N.Y. Dep't of Corrections Proc. for Implementing Standards of Inmate Behavior Parts 252 and 253 (violation and disciplinary hearings) (1983)); Texas (see Texas Dep't of Criminal Justice Disciplinary Rules and Procedures for Inmates at 3-4 (1991)); Virginia (see Va. Dep't of Corrections, Division of Adult Institutions, Operating Pro. 861-7.3 (April, 1992)); Washington (see Wash. Admin. Code § 137-28-105m (1991)); and Wyoming (see Wyo. Dep't of Corrections Code of Inmate Discipline § 5(b) (Mar. 1994)).

¹⁹ See Ala. Dep't of Corrections Admin. Reg. 403 (June 17, 1992); 22 Alaska Admin. Code § 05.470 (April 1994 Cum. Supp.); Ariz. Dep't of Corrections Rules of Discipline 12 (1986); Ark. Dep't of Correction Disciplinary Rules and Reg. § 831 at 23 (1990); 15 Cal. Code of Regulations (Barclays) § 3315(d) (1988); Colo. Dep't of Corrections Code of Penal Discipline at 32-35 (1981); Conn. Dep't of Correction Admin. Dir. 9.5 (1994); Del. Bur. Prisons Pro. No. 4.2 at 15-16 (1992); Fla. Dep't of Corrections R. 33-22.008 (1991); Ga. Bd. of

the latter situation, if good time credit is not forfeited, inmates subjected to disciplinary segregation or loss of

Corrections Institutional and Center Ops. § 125-3-2.08 (1990); Idaho Dep't of Correction Policy and Proc. Man. § 318-C at Attachment "A"; 20 Ill. Dep't of Corrections R. Part 504 Table A; Ind. Dep't of Correction Adult Disciplinary Policy Procedures § 30 (1990); Ky. Corrections Policies & Proc. 15.2 at 9 (1992); La. Dep't of Pub. Safety & Corrections Disciplinary Rules and Procedures for Adult Inmates at 12-14 (1994); Me. Dep't of Corrections Disciplinary Procedure Ch. 15.1 (1994); Md. Div. of Correction Reg. No. 105-1 at 8 (sentencing matrix) (1988); 103 Com. Mass. Reg. 430.25(3)(b), 430.25(5); Mich. Dep't of Corrections Policy Dir. 03.03.105 at 9 (1990); Miss. Dep't of Corrections Inmate Handbook at 7 (1992); Mo. Dep't of Corrections Inmate Rule Handbook at 18 and Mo. Dep't of Corrections Institutional Services Policy & Proc. Man. No. IS19-1.1 (June, 1994) (Attachments "A" and "B"); Mont. Dep't of Corrections & Human Services Inmate Disciplinary Policy at 11 (1989); 68 Neb. Dep't of Correctional Services Ch. 5 at 23; Nev. Dep't of Prisons Code of Penal Discipline at 42-43 (1993); N.H. Dep't of Corrections Policy & Proc. Dir. 1.5.25 (1993) (Appendix II); N.J.R. 1991 d.276 § 10A:4-5.1 (1991); N.M. Corrections Dep't Policy CD-090301 at Attachments "A"- "F" (1991); N.Y. Dep't of Corrections Proc. for Implementing Standards of Inmate Behavior Part 254 (1983); N.C. Div. of Prisons Inmate Disc. Procedures 2B.0200 at 6-8 (1991); N.D. State Pen. Inmate Handbook at 15 (1994); Ohio Admin. Code § 5120-9-56 (1988); Okla. Dep't of Corrections Policy and Operations Manual OP-060125 (1993), at Attachment "A"; Ore. Admin. R. § 291-105-069(1); S.D.C.L. § 24-2-9 (1994); Tenn. Dep't of Correction Admin. Policies & Proc. 502.01 at 16 (1993); Texas Dep't of Criminal Justice Disciplinary Rules and Procedures for Inmates at 13-14 (1991); Vt. Dep't of Corrections Directive 410.3 and Appendix "I"; Va. Dep't of Corrections, Division of Adult Institutions, Operating Pro. 861-7.3 (April 1992); Wash. Admin. Code § 137-28-030 (1992); W. Va. Dep't of Corrections Policy Directive 670.00 at 16 (1991); Wyo. Dep't of Corrections Code of Inmate Discipline at 17 (1994).

privileges alone have no greater standing than Respondent to complain of alleged procedural Due Process defects in their hearings.

Federal judicial review of assignments to disciplinary segregation and denial of other privileges, perhaps even more so than federal review of the "custody" of state prisoners under the federal habeas corpus statute, 28 U.S.C. § 2254, imposes untoward costs on the legal system, and undermines the values of "[o]ur system of federalism." *Greenholtz*, 442 U.S. at 13; cf. *Herrera v. Collins*, 113 S. Ct. 853 (1993) (where "life" was at stake). It discourages flexible responses to "the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful, law-abiding citizens." *Rhodes v. Chapman*, 452 U.S. at 352. Relatedly, and perhaps most disturbing of all, it does so in a way that retards the effectiveness and finality of one of the most important security measures at the prison – the disciplinary system – a measure whose function "is peculiarly left to the discretion of prison administrators." *Id.* at 349 n.14. If there were ever an area where the urge to federalize state-conferred privileges ought be restrained, this is it. See *Farmer v. Brennan*, 114 S. Ct. 1970, 1976-77 (1994); *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989); *Whitley v. Albers*, 475 U.S. 312, 320-22 (1986); *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Assuming, *arguendo*, that Hawaii's rules operated in the "mandatory" manner characterized by the Court of Appeals, Hawaii law would undoubtedly provide for prospective equitable relief for their breach, see *Pele Defense Fund, Inc. v. Paty*, 73 Haw. 578, 609, 837, 837 P.2d 1247, 1266 (1992), and, arguably, even for a tort remedy, see *Nakahira v. State*, 71

Haw. 581, 583, 799 P.2d 959, 961 (1990). "Liberty interest" analysis, like other features of Due Process doctrine, has been, and should be, respectful of "the delicate balance between state and federal courts" and of "the design of § 1983, a statute that reinforces a legal tradition in which protection for persons and their rights is afforded by the common law and the laws of the States, as well as by the Constitution." *Albright v. Oliver*, 114 S. Ct. 807, 818-19 (1994) (Kennedy, J., joined by Thomas, J., concurring in the judgment).

Indeed, this Court's perhaps most important recognition of the limits of "liberty interest" analysis, *Paul v. Davis*, 424 U.S. 693 (1976), provides powerful justification for reversal of the judgment below. For even assuming that Hawaii law provided "substantive predicates" and "mandatory outcomes" as the Ninth Circuit believed, the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 701. These comity concerns ought to be at their height in the realm of internal prison management. Unlike situations where the inmate faces the loss of good time credits or parole, the potential "loss" in being transferred from general population to the Special Holding Unit simply does not have "real substance" in the constitutional sense this Court announced in *Wolff* twenty years ago. See 418 U.S. at 557. Regardless of any "mandatory" language Hawaii may have used in constraining assignments to the SHU, the ability to avoid such assignments is not, and ought not to be viewed to be, "sufficiently embraced within Fourteenth Amendment 'liberty'" to mandate federally imposed procedures that "insure that [any] state created right is not arbitrarily abrogated." *Id.*

For these reasons alone, and apart from the specific doctrinal flaws in the Ninth Circuit's judgment which are discussed, *infra*, the decision below should be reversed.

II. Particularly Given the Substantiality of the Question Whether Prison Rules Concerning Disciplinary Segregation Could Create a Liberty Interest, the Ninth Circuit's Judgment Should Be Reversed Because of the Express Ability of the Adjustment Committee to Impose No Sanction, the Implied Discretion of the Committee to Convict, the Express and Unfettered Authority of the Warden to Overrule an Acquittal, and the Procedural Nature of a Burden of Proof Rule.

As Part I demonstrates, the broad question whether prison rules pertaining to disciplinary segregation and related losses of privileges should ever give rise to a "liberty interest" under the Due Process Clause raises at a minimum substantial and important issues that, if acted upon by this Court, would affect almost every penal system in the Nation.²⁰ Given this fact, the Ninth Circuit was plainly wrong in holding that Hawaii's "burden-of-

²⁰ Because state law would almost certainly provide some form of judicial review for compliance with any mandates of the adjustment process, such as they are, see *Pele Defense Fund, Inc.*, *supra*, this case does not present the "difficult question of constitutional law" concerning the "extent to which legislatures may commit to an administrative body . . . unreviewable authority." Cf. *Superintendent v. Hill*, 472 U.S. 445, 450 (1985) (good time credit case). Rather, the "difficult question" here is whether the Due Process Clause federalizes state law claims challenging disciplinary findings that neither implicate loss of good time credits nor necessarily affect parole.

proof" rule gave rise to the "substantive predicates" and "mandatory language" that this Court, in *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1990), found, at the least, must be present before a prison rule will trigger Due Process analysis. Cf. *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) ("statutes will be interpreted to avoid constitutional difficulties"). Generally speaking, "[t]he Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). For these reasons, this Court has it within its prerogative to reverse the judgment below on narrow grounds. See *United States v. Leon*, 468 U.S. 897, 905 (1984). See also S. Ct. R. 14.1. Given the nature of Hawaii's regulations, the judgment presents such grounds at least four times over.

A. Thompson's Two-Way Mandatory Outcomes Test Is Appropriate for Evaluating Whether States Have Created "Liberty Interests" In their Regulations Governing the Internal Management of their Prisons; Under that Test, the Judgment Below is Plainly Wrong.

Thompson's "substantive predicates"/"mandatory outcomes" test, as a means of constraining the category of cases where internal prison rules trigger Due Process requirements, first demands that there be "'substantive predicates' to guide the decisionmaker," and then "requir[es] that a particular result is to be reached upon a finding that the substantive predicates are met." 490 U.S. at 463-64. In *Thompson* itself, the Court reasoned that, even though "[v]isitors may be excluded if they fall

within one of the described categories," "they need not be," and hence the rules were "not mandatory." *Id.*

Here, as the Ninth Circuit interpreted Hawaii's rule, inmates found by "substantial evidence" to have committed disciplinary infractions "may be" assigned to segregation for a period of time, but they "need not be." *Id.* This, without more, ought to have compelled the Ninth Circuit to affirm with respect to the disciplinary segregation issues. See *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). Instead, the Ninth Circuit followed the reasoning of the dissent in *Thompson*, see 490 U.S. at 475 (Marshall, J., joined by Brennan, and Stevens, JJ., dissenting). Although this "two-way" mandatory outcomes analysis may be inappropriate in other settings, see *Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331, 2341 (1994), Thompson's reliance on that formulation merely recognizes that "regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to 'liberty,' different from statutes and regulations in other areas." *Hewitt, supra*, 459 U.S. at 470. Other federal courts have dutifully followed Thompson's reasoning in the prison context, see *Burgin v. Nix*, 899 F.2d 733, 735 (8th Cir. 1990); *Woods v. Thieret*, 903 F.2d 1080, 1083 (7th Cir. 1990), and neither the Court of Appeals nor Respondent offer any good reason why Thompson's reasoning should not be applied to these facts.

For this reason alone, the judgment should be reversed.

B. The Ninth Circuit's Decision Incorrectly Reads Hawaii's Disciplinary Regulations to Constrain the Situations Where the Adjustment Committee may Convict.

The judgment below independently defies the rule that "the mandatory language requirement is not an invitation to courts to search regulations for *any* imperative that might be found." *Thompson*, 490 U.S. at 464 n.4. Whereas the Ninth Circuit held that under Haw. Admin. R. § 17-201-18(b) "the inmate must admit guilt or the prison disciplinary committee must be presented with substantial evidence before the committee may make a finding of guilt," the rule simply provides no such thing. Rather, the rule states that "[a] finding of guilt shall be made where" "[t]he inmate or ward admits the violation or pleads guilty" or "[t]he charge is supported by substantial evidence." Br. App. 21a (emphasis added).²¹ While the rules require the committee to find "substantial evidence" before deciding, under the *compulsion* of the

²¹ Indeed, the structure of the regulation, which mandates conviction upon a finding of substantial evidence, is nothing more than a means of assuring that lower-level subordinates take seriously their constitutional duty to maintain order and thereby prevent injuries to inmates, staff, and visitors. See *Farmer v. Brennan*, 114 S. Ct. 1970 (1994); *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). Although Petitioner submits that the lack of any mandatory outcome eliminates any "liberty interest" for bystanders who might be caught up in a fray triggered, for example, by Conner's disrespectful remarks during a strip search, if there is a bias in the rules it is *against* acquittal. Given the inmates at Halawa, this bias is warranted. See *Sandin Aff.* ¶ 12 (CR 83; J.A. 207) ("[a]pproximately one-half the Module A inmates have serious mental problems and many others are violent").

adjustment process, whether and to what extent to order an inmate segregated, the rules *permit* the committee to convict, in its discretion (and to order disciplinary segregation), on the basis of *any* proof at all, so long as the disciplinary action is "based upon more than mere silence." *Id.* This most minimal of requirements hardly can oust the discretion of the Adjustment Committee sufficiently to create a liberty interest. Cf. *Olim*, 461 U.S. at 242-43 (administrator could "hold in abeyance" recommended decision only upon his determination that the action "jeopardize[d] the safety, security, or welfare of the staff, inmate . . . , other inmates, . . . institution, or community"). This Court should reverse.

C. Irrespective of the Constraints on the Adjustment Committee, Hawaii Grants the Warden Unfettered Discretion to Override the Adjustment Committee, Even if there is No Substantial Evidence of a Rule Violation.

Irrespective of the constraints on the Adjustment Committee, the Hawaii regulations provide that "[t]he facility administrator may . . . initiate review of any adjustment committee decision and it shall be within the administrator's discretion to modify *any* committee findings or decisions[.]" Haw. Admin. R. § 17-201-20(b). There is no requirement that the Administrator must find substantial evidence, indeed, *any* evidence of misconduct, in order to make such a "modification." There is no limit on the extent to which a "finding or decision" may be "modified." Indeed, there is no constraint on the reasons why the Administrator might "modify" a "finding or decision." Although Conner himself was the beneficiary

of this authority, and as a result of the Administrator's action Conner's "major misconduct" was expunged, *see* Pet. App. "G"; J.A. 249, what the Court of Appeals overlooked is that the warden's "discretion to modify any committee findings or decisions" cuts both ways.

That "discretion" is totally unfettered when it comes to overturning the dismissal of misconduct charges, or the refusal to impose sanctions, even if such dismissals might be compelled, at the committee level, by a "substantial evidence" burden of proof. In this sense, Hawaii's Adjustment Committees are advisory only, and this case is on all fours with *Olim v. Wakinekona*, 461 U.S. 238 (1983). "If officials may transfer a prisoner 'for whatever reason or for no reason at all,' " "there is no [liberty] interest for process to protect." *Id.* at 250.

Hawaii, and all other States, have the right to structure their disciplinary systems to provide less leeway to subordinate officials. In fact, such structuring is commendable both from a penological as well as a constitutional perspective, given the fact that such lower-level officials "are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee." *Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985) (good time credits).

By contrast, Hawaii assigns to its facility administrators the broadest discretion, in recognition of the wider "world view" the most senior prison administrator obtains by experience with a run of cases, and the facility-wide perspective of what strategy "best fits the agency's overall policies, and indeed, whether the agency has enough resources to under-

take the action at all." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

In holding that imposition of a "burden of proof" mandate at the committee level sufficiently constrained the State's ability to confine Conner and other inmates in disciplinary segregation, the Ninth Circuit erred. Given the Administrator's discretion, Conner, in the end, had no more than " 'a unilateral hope,' " rather than "a legitimate claim of entitlement" to avoid disciplinary segregation. *See Thompson*, 490 U.S. at 460. Even if the Ninth Circuit's construction of the Adjustment Committee's discretion was correct, "the prison Administrator's discretion to transfer an inmate [to disciplinary segregation] is completely unfettered." *Olim*, 461 U.S. at 249. Because of this fact, the judgment below is wrong, and should thus be reversed.

D. The Asserted Constraint Here is Merely Procedural, and Does Not Give Rise to Any "Liberty Interest" in Avoidance of a Transfer to Disciplinary Segregation.

The Ninth Circuit's judgment, even on its own terms, also makes nonsense of the settled understanding "that an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Olim*, 461 U.S. at 250 n.12.

As this Court has recognized, burden-of-proof rules constitute one of a number of "procedural protections" which society may choose to impose as a bulwark against adverse government action. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). A "standard of proof" thus goes to "process requirement[s]," *id.* at 755. Once federal law determines that there is a "liberty interest" at stake, "the fact that the state may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action," *id.* (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980)), is of no moment. It is for this very reason that the doctrine of *procedural* Due Process speaks to the adequacy of state burden-of-proof rules in those areas where "liberty interests" are put at risk.

In this case, however, the Ninth Circuit has inverted this Court's Due Process analysis by divining the presence of a federally protected "liberty interest" based merely on the existence of Hawaii's "own procedures." *Id.* That existence, at most, however, creates only "an expectation of receiving process," and does not create "a liberty interest." *Olim, supra*.

Indeed, the failure to reverse the judgment would not only disregard settled precedent, it would federalize virtually any administrative action in which a burden of proof played a role. Burdens of proof, in a wide variety of contexts, are only gateways through which administrative discretion is invoked. *Cf.* S. Ct. R. 10.1. While overcoming a burden of proof is often necessary to obtaining administrative relief, it is not always sufficient, and, when it is not sufficient, there can be no "legitimate claim of entitlement." *Thompson*, 490 U.S. at 454. Here, although the "substantial evidence" rule operates as a directive

outlining situations where the Adjustment Committee "shall" find guilt, it does not limit the circumstances where the Committee "may" take "action," nor, more importantly, does it in any way limit the Administrator's discretion to "modify any finding or decision" in any manner whatsoever.

This truth confirms that the judgment must be reversed.

III. Because Inmate Conner Could Have Been (Indeed Was Expressly on Other Occasions) Confined to the Special Holding Unit on the Basis of Undenially Discretionary Determinations Under Hawaii's System for Classification or Nonpunitive Segregation, He Had No "Liberty Interest" at All in this Case.

The Ninth Circuit's judgment not only ignores the discretion of Hawaii's prison administrators, within the adjustment process, to subject an inmate to segregation in the Special Holding Unit. It ignores as well the reality that "the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence," *Hewitt*, 459 U.S. at 469, and that Hawaii's rules for transferring inmates to the Special Holding Unit, as a matter of general classification policy, or under the power to administratively or protectively segregate an inmate, confer no "liberty interests."

No serious dispute could be raised that Hawaii's general classification procedure (Br. App. 2a-4a) gives

rise to federally protected "liberty interests." The classification rule is virtually identical to that reviewed in *Olim v. Wakinekona*, in which no "liberty interest" was found. See J.A. 243 (old rule). The criteria for administrative segregation permit transfer for reasons of prison safety or "any similarly justifiable reason," Br. App. 25a; cf. *Hewitt v. Helms*, 459 U.S. at 472. "Protective custody" can be ordered whenever "there is reason to believe that such action is necessary." Br. App. 25a. Each of these essentially standardless regulations provide "unfettered discretion" and create no "liberty interest" in a transfer. See *Olim*, *supra*.

As the Seventh Circuit observed in a related context:

Illinois has a rule of the form: "The warden may do A for any reason, but if that reason is M the warden must prove M before acting." One could restate this as: "The warden may do A for any reason except M." A in our case is changing the prisoner's job assignment. M is misconduct. Wallace may have taken hooch to his job at the tailor shop, which violates a rule of the prison. He may have been a goldbrick, knocking off work early. He may have gotten his supervisor's goat, which violates no rule but may make it wise to move him. Or he may have done all three. Whether the state employed procedures adequate to find the "true" reason matters only if a rule in the form we have described creates a liberty or property interest.

Wallace v. Robinson, 940 F.2d 243, 246 (7th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1563 (1992). Here, particularly given the similarities between assignment to SHU as a result of a "Phase I" classification and assignment to

SHU as a result of a misconduct finding, there is no good argument that placement in the general population modules was ever anything "'securely and durably'" Conner's. *Id.* Conner, indeed, spent many weeks in the SHU as a result of a Phase I classification. See J.A. 236-42. Even if all the Ninth Circuit assumed about disciplinary segregation were true, the decision below exists in a vacuum, and ignores "the remaining field of discretion," 940 F.2d at 248, which was independently "so large that no prisoner ha[d] a legitimate claim of entitlement" to avoid the conditions of disciplinary segregation. *Id.* Just as a prisoner "whose job assignment may be changed for any reason lacks such a substantive interest" which triggers Due Process, "even if the state has promised elaborate procedures before using a particular reason (misconduct) as the basis of action," *id.*, Conner had no "liberty interest" in remaining in general population. To the extent the misconduct finding marred his record, such a mark is in no meaningful way different from any other alleged libel, which does not state "a violation of a constitutional right at all." *Siebert v. Gilley*, 500 U.S. 226, 232 (1991); see *id.* at 233 (discussing *Paul v. Davis*, *supra*).

For these reasons as well, the judgment must be reversed.

IV. The Determination of the Court of Appeals that Petitioner Was Not Entitled to Qualified Immunity is Plain Error; Regardless of the Court's Disposition of the Question Presented, the Court Should Remand with Instructions to Dismiss the Damages Claims Against Petitioner, or, at a Minimum, for Reconsideration of those Claims and the Defense of Qualified Immunity in Light of the Grant of Review.

Because this Court expressly limited the grant of review to Question 1 of the Petition, Petitioner accepts

that, unless the Ninth Circuit's collateral ruling – that the summary judgment in her favor as to the damages issue could not be sustained under the doctrine of qualified immunity – is "plain error," this Court will not entertain the immunity issue. *See* S. Ct. R. 24.1(a). If, as Petitioner urges, the Court reverses the judgment below for any of the reasons urged above, the issue will be moot. If the Court does not so reverse the judgment, however, the Court should address the immunity issue under the "plain error" test.

Qualified immunity is a "protective" doctrine that " 'provides ample support to all but the plainly incompetent or those who knowingly violate the law.' " *Burns v. Reed*, 500 U.S. 478, 495 (1991). Since this Court adopted an "objective" test for qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), it has been clear "that officials performing discretionary functions are not subject to suit when [federal] questions are resolved against them only after they have acted." *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). While this Court's decision granting review does not expressly acknowledge uncertainty in the law, it impliedly establishes that the Ninth Circuit decided, at a minimum, "an important question of federal law which has not been, but should be, settled by this Court." S. Ct. R. 10.1(c). *See also id.* 10.1(a). Vindication of this Court's own decision to grant review, whether Petitioner wins or loses on the merits of the Question Presented, at a minimum requires reversal of the Ninth Circuit's denial of immunity at the summary judgment stage, for that denial of immunity implicitly assumed that the existence of a "liberty interest" was "clearly established." At the very least, the Court should, if it rules against Petitioner on the "liberty interest" issue, vacate

the judgment and remand for further review of the issue of qualified immunity, in light of the fact that plenary review was granted by this Court.

CONCLUSION

For the foregoing reasons and those stated by the Amici States, the judgment of the Court of Appeals should be reversed. Should the Court rule against Petitioner on the "liberty interest" issue, the Court nonetheless should reverse the Ninth Circuit's denial of immunity under the "plain error" standard, or at a minimum, should vacate the judgment denying immunity and remand to the Court of Appeals for further consideration in light of the grant of certiorari and the Court's opinion in this case.

Dated: Honolulu, Hawaii, November 15, 1994.

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TITLE 17
DEPARTMENT OF SOCIAL SERVICES
AND HOUSING
SUBTITLE 2 CORRECTIONS DIVISION
CHAPTER 200
ADMINISTRATIVE PROVISIONS

§17-200-1 *General provisions.* (a) This subtitle shall govern the corrections division of the department of social services and housing, State of Hawaii. Each individual facility may adopt rules governing its unique situation pursuant to chapter 353, subject to the approval of the director of the department of social services and housing and the governor. However, supersession of these rules shall be permitted only where necessary due to the unique characteristics of the facility.

(b) One copy of the corrections division and individual facility rules shall be given in handbook form to each inmate or ward and all staff personnel. Receipt of the rules shall be noted in each inmate's, ward's and employee's file. The rules shall also be posted at each facility. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-200-2 *Prior rules and regulations.* All prior rules and regulations of the corrections division are repealed. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-200-3 *Purpose.* Inmates and wards shall have all those rights and responsibilities as set forth in this subtitle, and not otherwise inconsistent with current settled case law. This subtitle is adopted for the sole purpose of

regulating the internal management of Hawaii correctional facilities. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

TITLE 17
DEPARTMENT OF SOCIAL SERVICES
AND HOUSING
SUBTITLE 2 CORRECTIONS DIVISION
CHAPTER 201
INMATE CUSTODY AND CONTROL

[Table of Contents Deleted]

SUBCHAPTER 1
THE CLASSIFICATION PROCESS

§17-201-1 *General provisions.* An inmate's or ward's classification determines where the inmate or ward is best situated within the corrections division. Classification is not dependent only upon isolated aspects of the individual, the individual's history and changing needs, the resources and facilities available to the corrections division, the other inmates or wards, the exigencies of the community and any other relevant [sic] factors. Classification is intended to be in the best interest of the individual, the state, and the community. In short, classification is a continuing evaluation of each individual to ensure that the inmate or ward is given the optimum placement within the corrections division. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-2 *Program committee.* (a) Where a program committee is deemed desirable, it shall be composed of at

least three members. A small facility may designate one person to act in the capacity as the program committee.

(b) When deemed desirable, the facility administrator may convene a program committee to assist with its recommendations. All classification decisions, including interstate transfers or increases in classification, may be accomplished without convening a program committee.

(c) An inmate or ward may be detained for a reasonable time pending a program committee review, if, in the judgment of the facility administrator, the detention is necessary:

- (1) To protect life or limb;
- (2) For the security or good government of the facility;
- (3) To protect the community;
- (4) For any other good reason.

(d) Because of the advisory nature of the program committee, the committee's review process, where deemed desirable, may be informal and non-adversarial. Considerations regarding notice, the appearance of the inmate or ward before the program committee, opportunity to be heard, presentation of evidence or testimony, availability of counsel substitute, or confrontation and cross-examination are entirely within the discretion of the program committee.

(e) The inmate or ward shall be apprised of the findings of the program committee:

- (1) Upon completion of the review, the committee may take the matter under advisement and will render a recommendation.

The inmate or ward's silence may be a revelant [sic] factor.

- (2) The inmate or ward shall be given a brief written summary of the committee's findings within a reasonable time after the review which findings shall briefly set forth the reasons for the action taken.
- (3) The facility administrator may review the program committee's recommendation and:
 - (A) Affirm or reverse, in whole or part, the recommendation.
 - (B) Hold in abeyance any action the administrator believes jeopardizes the safety, security, or welfare of the staff.
 - (C) Make any decision regarding an inmate's or ward's placement or classification deemed appropriate. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-3 *Review*. Each inmate or ward has the right to seek administrative review of the decision through the grievance process. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

SUBCHAPTER 2 THE ADJUSTMENT PROCESS

§17-201-4 *General provisions*. The adjustment process tailors punishment for specific rule violations to the individual's training and treatment needs while maintaining facility order and ensuring respect for rules and the

rights of others. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-5 *Rights, privileges, and responsibilities*. (a) The rights and privileges of all inmates and wards shall be as follows:

- (1) You may expect that as a human being you will be treated respectfully, impartially, and fairly by all personnel.
- (2) You shall be informed of the rules, procedures, and schedules concerning the operation of the institution.
- (3) You have the right to freedom of religious affiliation, and voluntary religious worship.
- (4) You will be provided health care which includes nutritious meals, proper bedding and clothing, a laundry schedule for cleanliness of the same, an opportunity to shower regularly, proper ventilation, a regular exercise period, toilet articles, and medical and dental treatment.
- (5) You may reasonably correspond and visit with family members, friends, and other persons according to the rules and schedules of the facility where there is no threat to security, order, or correctional programming.
- (6) You may have access to the courts by correspondence on matters such as the legality of your conviction, pending criminal cases, or the conditions of your confinement.

- (7) You may utilize reading material for educational purposes and for your own enjoyment.
- (8) You have the right to participate in counseling, education, vocational training, employment, and other programs as far as resources are available and in keeping with your interests, needs, and abilities.

(b) The responsibilities of all inmates and wards shall be as follows:

- (1) You have the responsibility to treat others respectfully, impartially, and fairly.
- (2) You have the responsibility to know and abide by the rules, procedures, and schedules concerning the operation of the institution.
- (3) You have the responsibility to recognize, respect, and not interfere with the rights of others.
- (4) It is your responsibility to not waste food, to follow the laundry and shower schedule, to maintain neat and clean living quarters, and to seek medical and dental care as you may need it.
- (5) It is your responsibility to conduct yourself properly during visits, to not accept or pass contraband, and to not violate the law through your correspondence.
- (6) You have responsibility to present to the court honestly and fairly your petitions, questions, and problems.
- (7) It is your responsibility to seek and utilize reading materials for personal benefit,

without depriving others of their equal right to the use of this material.

- (8) You have the responsibility to take advantage of activities which may help you live a successful and law abiding life within the institution and in the community. You will be expected to abide by the regulations governing the use of such activities. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-6 *Prohibited acts within institutions of the division; greatest misconduct category.* (a) Acts constituting misconduct of the greatest category shall be as follows:

- (1) Sexual assault.
- (2) Killing.
- (3) Assaulting any person, with or without a dangerous instrument, causing bodily injury.
- (4) The use of force on or threats to a correctional worker or the worker's family.
- (5) Escape:
 - (A) From closed confinement, with or without threat of violence;
 - (B) From an open facility or program involving the use of violence or threat of violence.
- (6) Setting a fire.
- (7) Destroying, altering, or damaging government property or the property of another person resulting in damage of \$1,000 or more, including irreplaceable documents.

- (8) Adulteration of any food or drink which does or could result in serious bodily injury or death.
- (9) Possession or introduction of an explosive or ammunition.
- (10) Possession or introduction of any firearm, weapon, sharpened instrument, knife, or other dangerous instrument.
- (11) Rioting.
- (12) Encouraging others to riot.
- (13) The use of force or violence resulting in the obstruction, hindrance, or impairment of the performance of a correctional function by a public servant.
- (14) Any lesser and reasonably included offense of the acts in paragraph [sic] (1) to (13).
- (15) Any other criminal act which the Hawaii Penal Code classifies as a class A felony.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (b) shall include one or more of the following:

- (1) Disciplinary segregation up to sixty days.
- (2) Any other sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-7 *Prohibited acts; high misconduct category.* (a) Acts constituting misconduct of high category shall be as follows:

- (1) Fighting with another person.
- (2) Threatening another person, other than a correctional worker, with bodily harm, or with any offense against the other person or the other person's property.
- (3) Extortion, blackmail, protection; demanding or receiving anything of value in return for protection against others, to avoid bodily harm, or under threat of informing.
- (4) Assaulting any person without weapon or dangerous instrument.
- (5) Escape from an open institution or program, conditional release center, or work release furlough which does not involve the use or threat of violence.
- (6) Attempting or planning escape.
- (7) Destroying, altering, or damaging government property or the property of another person resulting in damages between \$500-\$999.99.
- (8) Tampering with or blocking any locking device.
- (9) Adulteration of any food or drink which could or does result in bodily injury or sickness.
- (10) Possession of an unauthorized tool.
- (11) Possession or introduction or use of any narcotic paraphernalia, drugs, or intoxicants not prescribed for the individual by the medical staff.

- (12) Possession of any staff member's clothing or equipment.
- (13) Encouraging or inciting others to refuse to work or to participate in work stoppage.
- (14) The use of physical interference or obstacle resulting in the obstruction, hindrance, or impairment of the performance of a correctional function by a public servant.
- (15) Giving or offering any public official or staff member a bribe.
- (16) Any lesser and reasonably included offense of paragraphs (1) to (15).
- (17) Any other criminal act which the Hawaii Penal Code classifies as a class B felony.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

- (1) Disciplinary segregation up to thirty days.
- (2) Any other sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-8 *Prohibited acts; moderate misconduct category.*

(a) Acts constituting misconduct of moderate category shall be as follows:

- (1) Engaging in sexual acts.
- (2) Making sexual proposals or threats to another.
- (3) Indecent exposure.

- (4) Wearing a disguise or a mask.
- (5) Destroying, altering, or damaging government property or the property of another person resulting in damages between \$50-\$499.99.
- (6) Theft.
- (7) Misuse of authorized medication.
- (8) Possession of unauthorized money or currency.
- (9) Loaning of property or anything of value for profit or increased return.
- (10) Possession of anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate or ward through regular institutional channels.
- (11) Refusing to obey an order of any staff member.
- (12) Violating a condition of any community release or furlough program.
- (13) Unexcused absence from work, or other authorized assignment.
- (14) Failing to perform work as instructed by a staff member.
- (15) Lying or providing false statements, information, or documents to a staff member, government official, or member of the public.

- (16) Counterfeiting, or unauthorized reproduction of any document, article, or identification, money, security, or official paper.
- (17) participating in an unauthorized meeting of gathering.
- (18) Being in an unauthorized area.
- (19) Failure to follow safety or sanitary rules.
- (20) Using any equipment or machinery which is not specifically authorized.
- (21) Using any equipment or machinery contrary to instructions or posted safety standards.
- (22) Failing to stand count.
- (23) Interfering with the taking of count.
- (24) Making intoxicants or alcoholic beverage.
- (25) Being intoxicated.
- (26) Gambling.
- (27) Preparing or conducting a gambling pool.
- (28) Possession of gambling paraphernalia.
- (29) Being unsanitary or untidy; failing to keep one's person and one's quarters in accordance with posted safety standards.
- (30) Unauthorized contacts with the public or other inmates.
- (31) Giving money or anything of value to or accepting money or anything of value

from an inmate or ward, a member of the inmate's or ward's family, or friend.

- (32) Any lesser and reasonably included offense of paragraphs (1) to (31).
- (33) Any other criminal act which the Hawaii Penal Code classifies as a class C felony and misdemeanor.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

- (1) Disciplinary segregation up to fourteen days.
- (2) Any sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-9 *Prohibited acts; low moderate misconduct category:*

(a) Acts constituting misconduct of low moderate category shall be as follows:

- (1) Destroying, altering, or damaging government property, or the property of another person resulting in damage less than \$50.
- (2) Possession of property belonging to another person.
- (3) Possessing unauthorized clothing.
- (4) Malingering, feigning an illness.
- (5) Using abusive or obscene language to a staff member.

- (6) Smoking where prohibited.
- (7) Tattooing or self mutilation.
- (8) Unauthorized use of mail or telephone.
- (9) Correspondence or conduct with a visitor in violation of rules.
- (10) Any lesser and reasonably included offense of paragraphs (1) to (9).
- (11) Any other criminal act which the Hawaii Penal Code classifies as a petty misdemeanor.
- (12) Harassment of employees.

(b) Sanctions which may be imposed as punishment for acts listed in subsection (a) shall include one or more of the following:

- (1) Disciplinary segregation up to four hours in cell.
- (2) Monetary restitution.
- (3) Any sanction other than disciplinary segregation. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-10 *Prohibited acts; minor misconduct category*

(a) Acts constituting misconduct of minor category shall be any criminal act which the Hawaii Penal Code classifies as a violation.

(b) Sanctions which may be imposed as punishment for acts in subsection (a) shall include one or more of the following:

- (1) Loss of privileges (i.e., community recreation; commissary; snacks; cigarettes,

smoking; personal visits – no longer than fifteen days; personal correspondence; personal phone calls for not longer than fifteen days).

- (2) Impound inmate's personal property.
- (3) Extra duty.
- (4) Reprimand.

(c) Attempting to commit any of the above acts, aiding another person to commit any of the above acts, and conspiring to commit any of the above acts shall be considered the same as a commission of the act itself. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-11 *Minor misconduct; adjustments.* (a) A minor rule violation is defined as that which poses no serious threat to the safety, security, or welfare of the staff, other inmates or wards, or the institution or subjects the individual to the imposition of lesser penalties. Such misconduct may be punished by a staff member designated by the facility administrator who did not make the charge against the inmate or ward. The staff member shall inform the inmate or ward that the individual is accused of committing a minor infraction, to which the individual shall be given a brief opportunity to respond, to offer an explanation in defense, or otherwise show that the individual is not guilty of the alleged misconduct. The following sanctions may be imposed:

- (1) Loss of privileges; e.g., community recreation; commissary; snacks, cigarettes; smoking; personal visits no longer than fifteen days; personal correspondence no longer than fifteen days; personal phone calls.

- (2) Impound inmate's or ward's personal property.
- (3) Extra duty.
- (4) Reprimand.

(b) The officer shall prepare a brief written report to be given to and placed in the individual's file, indicating the infraction, the sanction, and the date or dates the sanction is to be or was carried out. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3).

§17-201-12 *Serious misconduct*. A serious rule violation is defined as that which poses a serious threat to the safety, security, or welfare of the staff, other inmates or wards, or the institution and subjects the individual to the imposition of serious penalties such as segregation for longer than four hours. Such misconduct shall be punished through the adjustment committee pursuant to the procedures in sections 17-201-13 to 17-201-20 [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-13 *Adjustment committee*. The adjustment committee shall be normally composed of at least three members who are not actually biased against the inmate or ward. A small facility may designate one person to act in the capacity of the adjustment committee. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-14 *Pre-hearing detention*. An inmate or ward may be detained for a reasonable time pending an adjustment committee hearing if, in the judgment of the facility administrator, detention is necessary:

- (1) To protect life or limb;
- (2) For the security or good government of the facility;
- (3) To protect the community;
- (4) For any other good reason. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-15 *Pre-hearing investigation*. (a) A staff member may conduct a complete investigation into the facts of the alleged misconduct to determine if there is probable cause to believe the inmate or ward committed misconduct. If the staff member finds sufficient cause to believe that a rule violation has occurred, the adjudication procedures may be initiated. Additionally, the pre-hearing investigator may present the evidence against the inmate or ward to the adjustment committee.

(b) The implementation of a pre-hearing investigation shall be within the facility administrator's discretion. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-16 *Notice*. (a) The inmate or ward shall receive prior notice that an adjustment committee hearing will be held regarding the individual.

(b) Within a reasonable time, not less than twenty-four hours before the hearing the charged inmate or ward shall be served with written notice of the time and place of the adjustment committee hearing, what the specific charges are, including a brief notation of the facts. If the inmate or ward waives the twenty-four hour period, the waiver shall be reduced to writing and signed by the inmate or ward on the face of the notice.

(c) The inmate or ward or counsel substitute shall have the opportunity to review all relevant non-confidential reports or misconduct or a summary of the details thereof during the period between the notice and the hearing.

(d) The misconduct report or summary shall briefly contain the following:

- (1) The specific rule violated;
- (2) The facts supporting the charge;
- (3) Any unusual inmate or ward behavior;
- (4) Any staff or inmate or ward witnesses; the disposition of any physical evidence (e.g., weapons); and
- (5) Any immediate action taken. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-17 *Hearing*. (a) The inmate or ward has a right to appear at the adjustment committee hearing, except where institutional safety or the good government of the facility would be jeopardized. If the individual is excluded from the hearing, reasons shall be given in writing. If the inmate or ward declines to attend the hearing, it shall be held regardless of the inmate's or ward's absence.

(b) The committee shall explain the reason for the hearing and the nature of the charge or charges against the inmate or ward. The inmate or ward shall plead guilty or not guilty to the charges. Failure to plead shall be accepted as a plea of not guilty.

- (1) A plea of guilty eliminates the need to consider other evidence against the inmate or ward who shall then be given an opportunity to explain the actions or offer evidence in mitigation.
- (2) A plea of not guilty necessitates the consideration of evidence against the inmate or ward.

(c) The inmate or ward shall be advised of the right to remain silent, but that silence may be used as a permissible inference of guilt. An inmate or ward cannot, however, be compelled to testify against oneself without the granting of immunity and may not be required to waive the immunity.

(d) Formal rules of evidence shall not apply. The committee may rely on any form of evidence, documentary, or testimonial, that it believes is reliable.

(e) Confrontation and cross examination:

- (1) The inmate or ward may be given the privilege to confront and cross examine adverse witnesses.
- (2) The committee may deny confrontation and cross examination and identification of adverse witnesses if in its judgment such a confrontation would:
 - (A) Subject the witnesses to potential reprisal;
 - (B) Jeopardize the security or good government of the facility;
 - (C) Be unduly hazardous to the facility's safety or correctional goals; or

(D) Otherwise reasonably appear to be impractical or unwarranted.

- (3) If confrontation and cross examination and identification of adverse witnesses are denied, the committee is encouraged to enter in the record of the proceeding and make available to the inmate or ward an explanation for the denial. Additionally, the inmate or ward may be given an oral or written summary of the confidential evidence against the individual and provided an opportunity to respond.

(f) The inmate or ward shall be given an opportunity to respond to evidence against the inmate or ward, explain the alleged misconduct, or offer evidence of mitigation.

- (1) The inmate or ward should be permitted to call witnesses and present evidence of defense as long as it will not be unduly hazardous to institutional safety or correctional goals.
- (2) The committee may deny the inmate's or ward's calling of certain witnesses or presentation of certain evidence, after being given an offer of proof as to the nature of the evidence, for reasons such as
 - (A) Irrelevance;
 - (B) Lack of necessity;
 - (C) The hazards presented in individual cases; or
 - (D) Any other justifiable reason.

In this regard, the committee may keep the hearing within reasonable limits and refuse the presentation of evidence or the calling of witnesses, keeping in mind the right of the inmate or ward to be heard. The committee is encouraged to state the reason for the refusal.

(g) An inmate or ward shall be permitted to employ counsel substitute. A counsel substitute shall be a member of the facility staff who did not actively participate in the process by which the individual was brought before the committee or, in the facility administrator's discretion, a sufficiently competent inmate or ward designated by the facility staff. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-18 *Findings.* (a) The inmate or ward has a right to be apprised of the findings of the adjustment committee.

(b) Upon completion of the hearing, the committee may take the matter under advisement and render a decision based upon evidence presented at the hearing to which the individual had an opportunity to respond or any cumulative evidence which may subsequently come to light may be used as a permissible inference of guilt, although disciplinary action shall be based upon more than mere silence. A finding of guilt shall be made where:

- (1) The inmate or ward admits the violation or pleads guilty.
- (2) The charge is supported by substantial evidence.

(c) The inmate or ward shall be given a brief written summary of the committee's findings which shall be

entered in the case file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken. The findings may properly exclude certain items of evidence if necessitated by personal or institutional safety and goals; the fact that evidence has been omitted and the reason or reasons therefor must be set forth in the findings. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3).

§17-201-19 *Punishment*. (a) The adjustment committee may render sanctions commensurate with the gravity of the rule and the severity of the violation. Corporal punishment is prohibited, provided that physical force may be employed for self defense or defense of others, to maintain the immediate order and security of the prison, to remove an inmate or ward pursuant to a lawful order, or any other reason demanded by the exigencies of institutional safety and correctional goals. The following types of punishment may be rendered by the adjustment committee:

- (1) Temporary loss of privileges.
- (2) Segregation or confinement not longer than sixty days, provided that a longer period may be imposed with the expressed written approval of the corrections division administrator, and the committee shall review the inmate's or ward's confinement at least once every thirty days.
- (3) Any other punishment deemed necessary by the adjustment committee.

(b) The committee may also refer the matter to the program committee for further action. A description of

the basic living levels of disciplinary confinement shall be as provided in subsections (c) to (h).

(c) The quarters used for segregation should be ventilated, adequately lighted, and maintained in a sanitary condition by the inmate or ward at all times. Normally, a segregated inmate or ward should be entitled to clothing, and bedding. If an inmate or ward is likely to destroy the clothing or bedding, injure oneself, or create a disturbance detrimental to others, or for other good reasons, materials may be removed from the cell until the condition which prompted removal subsides.

(d) Segregated inmates or wards shall be given an adequately nutritious diet.

(e) Segregated inmates or wards shall maintain an acceptable level of personal hygiene.

(f) Each segregated inmate or ward should be permitted indoor or outdoor exercise, unless security or institutional government dictates otherwise.

(g) Personal property will ordinarily be impounded, inventoried, and receipted.

(h) Normally, religious and legal materials are permitted. However, inmates or wards may be denied all reading and legal materials during temporary confinement for not longer than fifteen days. Access to legal materials shall be permitted if an inmate or ward demonstrates the need for the materials and for prompt access to the courts in preparation of a habeas corpus petition or other application for relief. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-20 *Review.* (a) Each inmate or ward has the right to seek administrative review of the decision of the disciplinary hearing officer or adjustment committee through the grievance process. Review shall be initiated within fourteen calendar days of the day of receipt of the committee's decision.

(b) The facility administrator may also initiate review of any adjustment committee decision and it shall be within the administrator's discretion to modify any committee findings or decisions. The administrator may demand [sic] any matter to the adjustment committee for further hearing or rehearing if the administrator believes it to be in the interest of justice. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

SUBCHAPTER 3 LEGAL REPRESENTATION

§17-201-21 *Inmate or ward legal counsel for adjustment process.* Inmates and wards shall not have the right to be represented by legal counsel before adjustment or program committees, or in proceedings related to interstate transfers or administrative segregation. Counsel may be allowed to participate in such proceedings in limited circumstances, but the granting of permission to participate shall be within the discretion of the facility administrator or a designated representative. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

SUBCHAPTER 4 ADMINISTRATIVE SEGREGATION AND TRANSFER

§17-201-22 *General provisions.* The facility administrator on a designated representative may administratively segregate or transfer, within or without the facility, any inmate or ward under any of the following circumstances:

- (1) Whenever the facility administrator or a designated representative determines that an inmate or ward has committed or threatens to commit a serious infraction.
- (2) Whenever the facility administrator or a designated representative, considering all the information available, including confidential or reliable hearsay sources, determines that there is reasonable cause to believe that the inmate or ward is a threat to:
 - (A) Life or limb;
 - (B) The security or good government of the facility;
 - (C) The community.
- (3) Whenever any similarly justifiable reasons exist. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-23 *Protective custody.* (a) Admission to protective custody may be made only where there is reason to believe that such action is necessary or the inmate or ward consents, in writing, to such confinement. Protective custody is continued only as long as necessary except where the inmate or ward needs long term protection and the facts requiring the confinement are documented.

(b) Where an inmate or ward consents to confinement, the inmate or ward may be reassigned to the general population within two weeks of the request to be returned unless there is reason to believe that continued protective custody is necessary. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-24 *Procedures*. Administrative segregation is nonpunitive in nature and may be imposed for an indeterminate period until such time as the facility administrator or a designated representative determines that the reason for such confinement no longer exists. Within a reasonable period after the initial imposition of administrative segregation, the inmate or ward should be given a written summary of the reasons for administrative segregation and an opportunity to present evidence in defense before the administrator or designated representative when permitting the inmate or ward to do so will not be unduly hazardous to institutional safety or correctional goals. The facility administrator should review the inmate's or ward's confinement at least once every thirty days. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-25 *Review*. Each inmate or ward had the right to seek administrative review of the decision through the grievance process. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

SUBCHAPTER 5 ADMINISTRATIVE REMEDY OF COMPLAINTS

§17-201-26 *General provisions*. (a) Most complaints can be resolved quickly and efficiently through direct contact

with staff who are responsible in the particular area of the problem. This is the preferred course of action. Staff awareness of the importance of prompt attention and reply to these routine requests will minimize the use of formal complaint procedures.

(b) A viable complaint procedure will serve the inmates and wards, the administration, and the courts. It will provide the inmate and ward with a systematic procedure whereby issues raised relating to confinement will receive attention and a written, signed response within a short period of time from the facility, and from the corrections division, if appealed.

(c) Such a procedure assists the administration by providing an additional vehicle for internal solution of problems at the level having most direct contact with the inmate or ward. It also provides a means for continuous review of administrative decisions and policies. Further, it provides a written record in the event of subsequent judicial or administrative review. A viable administrative remedy procedure should reduce the volume of suits filed in court and will develop an undisputed record of facts which will enable the courts to make more speedy dispositions. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-27 *DSSH-3810 form (Inmate Complaint Grievance)*. (a) If an inmate or ward cannot resolve a complaint through informal contact with staff, and wishes to file a formal complaint for administrative remedy, the individual should secure a copy of DSSH-3810 form and write the complaint in the space provided. The inmate or ward may secure assistance from staff or other inmates or

wards to complete the form. The inmate or ward should then give the completed form to a designated staff member, retaining a copy for the individual's own record.

(b) The complaint shall be filed within fourteen days from the date on which the basis of the complaint occurred unless it was not feasible to file within such period. Institution staff have up to fifteen days from receipt of the complaint, excluding weekends and holidays, to act upon the matter and provide a written response to the inmate or ward. When the complaint is of an emergency nature and threatens the inmate's or ward's immediate health or welfare, reply must be made as soon as possible, and normally within forty-eight hours from receipt of the complaint.

(c) When the proper course of action is determined, the response should be completed and signed. One copy should go to the inmate or ward, the original placed in the case file, and one copy to the corrections division administrator. Responses should be based upon facts which pertain specifically to the issue, and should deal only with the issue raised, and not include extraneous material.

(d) The complaint and grievance procedure shall follow in sequential steps as follows:

- (1) Step 1: Inmate or ward to section supervisor or parole officer.
- (2) Step 2: Inmate or ward to branch administrator.
- (3) Step 3: Inmate or ward to division administrator. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-28 *Referral outside of the branch.* In the event that a complaint or grievance is not resolved at the branch level, it shall be referred to the administrator, corrections division, for action if so initiated by the inmate or ward. The decision of the corrections division administrator shall be final. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

§17-201-29 *Referral to agencies or officials other than departmental.* An inmate or ward should, but is not required to first exhaust the administrative channels in this chapter in the quest of a resolution of the complaint or grievance before referring it to the ombudsman or other authorized officials. However, inmates and wards are advised that courts frequently require evidence that administrative remedies have been exhausted before granting relief through such means as habeas corpus. [Eff. Oct. 6, 1983] (Auth: HRS §353-3) (Imp: HRS §353-3)

Hawaii Revised Statutes (1985 & Supp. 1992) provide in relevant part that:

* * *

§353-1 Definitions; director may delegate powers. As used in this chapter unless the context clearly indicates otherwise:

"Department" means the department of public safety.

"Director" means the director of public safety; provided that the signing or approval of vouchers and other routine matters may be delegated by the director to any authorized subordinate. [L 1987, c 338, pt of §3; am L 1989, c 211, §8]

* * *

§353-6 Establishment of community correctional centers. There shall be a community correctional center for each county under the direction and administration of the director. Any community correctional center may be integrated and operated concurrently with any other correctional facility or facilities. Each center shall:

- (1) Provide residential detention for persons awaiting judicial disposition who have not been conditionally released;
- (2) Provide residential custody and correctional care for committed misdemeanants and for felons committed to indeterminate sentences;
- (3) Provide for committed persons, correctional services, including but not limited to, social and psychiatric-psychological evaluation, employment, counseling, social

inventory, correctional programming, medical and dental services, and sex abuse education and treatment programs for persons convicted of sexual offenses or who are otherwise in need of these programs;

- (4) Provide recreational, educational, and occupational training, and social adjustment programs for committed persons;
- (5) Provide referrals to community educational, vocational training, employment, and work study programs; and aftercare, supervisory, and counseling services for persons released from centers. [L 1987, c 338, pt of §3; am L 1989, c 350, §1]

§353-7 High security correctional facility. (a) The director shall maintain a high security correctional facility for the residential care, correctional services, and control of high custodial risk convicted felons or the temporary detention of high custodial risk persons awaiting trial. The high security correctional facility may be integrated and operated concurrently with any other correctional facility or facilities.

(b) The Facility shall:

- (1) Provide extensive control and correctional programs for categories of persons who cannot be held or treated in other correctional facilities including, but not limited to:
 - (A) Individuals committed because of serious predatory or violent crimes against the person;
 - (B) Intractable recidivists;

- (C) Persons characterized by varying degrees of personality disorders;
 - (D) Recidivists identified with organized crime; and
 - (E) Violent and dangerously deviant persons;
- (2) Provide correctional services including, but not limited to, psychiatric and psychological evaluation, social inventory, correctional programming, and medical and dental services; and
 - (3) Provide recreational, educational, occupational training, and social adjustment programs. [L 1987, c 338, pt of §3; am L 1989, c 41, §1]

§353-8 Conditional release centers for committed persons. (a) The director may establish and operate facilities to be known as conditional release centers, either operated separately, or as part of community correctional centers.

(b) The purpose of such facilities is to provide housing, meals, supervision, guidance, furloughs, and other correctional programs for persons committed to the department of public safety and to give committed persons, in selected cases, a chance to begin adjustment to life in a free society and to serve as a test of an individual's fitness for release on parole.

(c) The department shall notify the county prosecutors and police chiefs whenever a person committed for an offense against the person as described in chapter 707, or any convicted felon, is admitted to a work furlough, conditional release, or similar program. Notification shall

be transmitted in writing no later than thirty days prior to the commencement of the program and shall list the conditions pertaining thereto.

(d) Additionally, whenever the department admits a committed person who has been convicted of an offense against the person as described in chapter 707, or of an attempt to commit such an offense, to a work furlough program, conditional release program, or other similar programs, it shall give written notice to each victim of the offense, who has made written request for such notice, of the admission of the committed person to the program. Notice shall be given to the victim at the address given on the request for notice or such address as may be provided to the department by the victim from time to time. Neither the failure of any state officer or employee to carry out the requirements of this section nor compliance with it shall subject the State or the officer or employee to liability in any civil action. However, such failure may provide a basis for such disciplinary action as may be deemed appropriate by competent authority. [L 1987, c 338, pt of §3; am L 1989, c 211, §8; am L 1992, c 64, §1]

§353-9 Establishment of temporary correctional facilities. The director, with the prior approval of the governor, may establish, from time to time, temporary correctional facilities, if required in conjunction with projects or specialized service authorized by law. The temporary facilities shall be discontinued upon termination of the project. [L. 1987, c 338, pt of §3]

* * *

§353-64 Prisoners paroled. Any prisoner confined in any state prison in execution of any sentence imposed

upon the prisoner, except in cases where the penalty of life imprisonment not subject to parole has been imposed, shall be subject to parole in manner and form as set forth in this part. [L 1917, c 103, §1; RL 1925, §1560; am L 1931, c 126, §1; RL 1935, §6435; RL 1945, §3958; am L 1955, c 239, §1; RL 1955, §83-63; HRS §353-64; am imp L 1984, c 90, §1]

* * *

[In 1988, the proceeding section was amended to read;]

§353-64 Committed persons paroled. Any committed person confined in any state correctional facility in execution of any sentence imposed upon the committed person, except in cases where the penalty of life imprisonment not subject to parole has been imposed, shall be subject to parole in manner and form as set forth in this part; provided that to be eligible for parole, the committed person, if the person is determined by the department to be suitable for participation, must have been a participant in an academic, vocational education, or prison industry program authorized by the department and must have been involved in or completed the program to the satisfaction of the department; and provided further that this precondition for parole shall not apply if the committed person is in a correctional facility where academic, vocational education, and prison industry programs or facilities are not available. [L 1917, c 103, §1; RL 1925, §1560; am L 1931, c 126, §1; RL 1935, §6435; RL 1945, §3958; am L 1955, c 239, §1; RL 1955, §83-63; HRS §533-64; am imp L 1984, c 90, §1; am L 1988, c 147, §1]

§353-65 Paroles; rules and regulations. The Hawaii paroling authority may establish rules and regulations, with the approval of the governor and the director of social services not inconsistent with this part, under which any prisoner may be paroled but shall remain, while on parole, in the legal custody and under the control of the paroling authority, and be subject, at any time until the expiration of the term for which the prisoner was sentenced, to be taken back within the enclosure of the prison. The rules and regulations shall have the force and effect of law. Full power, subject to this part, to enforce the rules and regulations, to grant, and to revoke paroles is conferred upon the paroling authority. The power to retake and reimprison a paroled prisoner is conferred upon the administrative secretary, who may issue a warrant authorizing all of the officers named therein to arrest and return to actual custody any paroled prisoner. The superintendent of Hawaii state prison, the chief of police of each county and all police officers of the State or of any county, and all prison officers shall execute any such order in like manner as ordinary criminal process.

If any prisoner so paroled leaves the State without permission from the paroling authority, the prisoner shall be deemed to be an escaped prisoner, and may be arrested as such. [L 1917, c 103, §2; RL 1925, §1561; am L 1931, c 126, §2; am L 1932 1st, c 17, §8; RL 1935, §6454; am L 1939, c 203, pt of §6; RL 1945, §3959, RL 1955, §83-64; am L 1957, c 308, §1; am L 1963, c 34, §§1, 2; am L 1965, c 96, §57; HRS §353-65; am L 1969, c 208, §1; am L 1976, c 92, pt of §8; am imp L 1984, c 90, §1]

* * *

§353-68 Parole, how initiated and granted. (a) Paroles may be granted by the Hawaii paroling authority at any time after the prisoner has served the minimum term of imprisonment fixed according to law; provided that where a fine has also been imposed, which has not been paid, and if the prisoner has been imprisoned for at least thirty days, the paroling authority upon being satisfied that the prisoner has petitioned the court for revocation of all or part of such fine pursuant to section 706-645, may nevertheless parole the prisoner without payment of the fine, either with or without the condition, subject to determination by the court under section 706-645, that while on such parole the prisoner make payment of the fine as the paroling authority deems proper under the circumstances. The proceedings to obtain parole may be initiated by the written recommendation of the superintendent to the paroling authority or may be initiated by the paroling authority without any such recommendation.

(b) The governor shall have like power to revoke the parole of any prisoner. The written authority of the governor shall likewise be sufficient to authorize any police officer to retake and return the prisoner to prison. The governor's written order revoking the parole shall have the same force and effect and be executed in like manner as the order of the chairman of the paroling authority.

(c) The paroling authority shall act by majority of all its members in respect of all proceedings touching the

parole of prisoners. [L 1931, c 126, §4; RL 1935, §6456; am L 1939, c 203, pt of §6; am L 1943, c 207, §2; RL 1945,

* * *

§353-69 Parole when. No parole shall be granted unless it appears to the Hawaii paroling authority that there is a reasonable probability that the prisoner concerned will live and remain at liberty without violating the law and that the prisoner's release is not incompatible with the welfare and safety of society. [L 1917, c 103, §4; RL 1925, §1563; am L 1931, c 126, §5; RL 1935, §6457; RL 1945, §3962; RL 1955, §83-67; HRS §353-69; am L 1976, c 92, pt of §8; am imp L 1984, c 90, §1]

§353-70 Final discharge. Whenever, in its opinion, any paroled prisoner has given such evidence as is deemed reliable and trustworthy that the paroled prisoner will remain at liberty without violating the law and that the paroled prisoner's final release is not incompatible with the welfare of society, the Hawaii paroling authority may grant the prisoner a written discharge from further liability under the prisoner's sentence.

Any parole prisoner who has been on parole for at least five years shall be brought before the paroling authority for purposes of consideration for final discharge and complete pardon. In the event the prisoner is not granted a final discharge and full pardon, the paroled prisoner shall be brought before the paroling authority for the aforementioned purposes annually thereafter.

Any person, who, while on parole, enters the military service of the United States, may, upon the person's honorable discharge therefrom, petition the paroling authority for a final discharge, and the paroling authority may consider the honorable discharge as grounds for granting a final discharge from parole and recommending to the governor a full pardon. [L 1917, c 103, §7; RL 1925, §1566; am L 1931, c 126, §7; RL 1945, §3963; am L 1949, c 2, §1; RL 1955, §83-68; am L 1957, c 308, §4; am L 1963, c 149, §1; HRS §353-70; am L 1976, c 92, pt of §8; am imp L 1984, c 90, §1]

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HAWAII ADMINISTRATIVE RULES
TITLE 23
DEPARTMENT OF PUBLIC SAFETY
SUBTITLE 5
HAWAII PAROLING AUTHORITY
CHAPTER 700

* * *

SUBCHAPTER 1

Hawaii Paroling Authority

23-700-1 Definitions. As used in this chapter, unless the context otherwise requires:

"Authority" means the Hawaii Paroling Authority.

"Administrative review" is a review by the Authority of an inmate's status and adjustment without the presence of the inmate.

"Administrative Secretary" means the Parole and Pardon Administrator or the Administrator's designee.

"Chairperson of the Authority" means the Chairperson of the Authority or the Chairperson's designee.

"Formal decisions of the Authority" means the fixing or reduction of a minimum term of imprisonment, a decision on a request for reduction of minimum term of imprisonment, a pardon or commutation recommendation and granting, denying, revoking, suspending or reinstating parole.

"Hearing" means a formal Authority meeting with an inmate or parolee, and does not include or mean executive sessions or decision-making sessions by the Authority.

"Inmate" means a person committed to the Department of Public Safety with an indeterminate or extended term of imprisonment.

"Interview" is an informal meeting with one or more members of the Authority and an inmate.

"Offense against the person" means any of the offenses described in Chapter 787 of Hawaii Revised Statutes and includes any attempt to commit any of those offenses.

"Parolee" means a person who has been paroled by the Authority who has not served the maximum term of imprisonment, has not been discharged from the sentence, or had parole revoked by the Authority.

"Surviving immediate family member" means a person who is a surviving grandparent, parent, sibling, spouse, child or legal guardian of a deceased victim.

"Victim" means the person who was the victim of the offense against the person for which the inmate or parolee was convicted.

[Eff AUG 22 1992] (Auth: HRS 353-62, 353-65) (Imp: HRS 353-62, 353-65)

23-700-2 General. (a) The parole system is to protect the community. Protection of the community and reintegration of an inmate into the community is accomplished by fixing an appropriate minimum term of

imprisonment, granted or denying parole, revoking parole, and supervising the inmate on parole.

(b) The Authority consists of three persons; one full-time and two part-time members, appointed by the Governor and confirmed by the State Senate. The Authority is an independent quasi-judicial body which, for administrative purposes only, is attached to the Department of Public Safety. Decisions of the Authority are not subject to the approval of the Department of Public Safety.

Formal decisions of the Authority shall not be conclusive and final unless at least two members are in agreement. [Eff AUG 22 1992] (Auth: HRS 353-62, 353-65) (Imp: HRS 353-62, 353-65)

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[SUBCHAPTER 2 DELETED]

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SUBCHAPTER 3

PAROLE

23-700-31 Consideration for parole. (a) The Authority shall afford an inmate a parole hearing no later than thirty days prior to the expiration of an inmate's longest minimum term of imprisonment, and on the basis of the hearing grant or deny parole prior to the expiration of the longest minimum term of imprisonment.

(b) When parole is denied, another parole hearing shall be scheduled to take place within twelve months of the last parole hearing date; provided the inmate does not appear before the Authority within the twelve months for

fixing of minimum term of imprisonment for another offense. The Authority shall set a parole hearing date at that time.

(c) When parole is granted, it may be rescinded prior to the release of the inmate on parole when the Authority receives new information on the inmate that would be the basis to deny parole. [Eff AUG 22 1992] (Auth: HRS 353-62, 353-65) (Imp: HRS 353-65, 353-68, 706-670)

23-700-32 Parole consideration procedures, (a) The Authority shall serve an inmate with written notice of a parole hearing. The notice shall be served on the inmate and inmate's attorney at least seven days prior to the parole hearing.

(b) The Authority shall inform the inmate in writing of the inmate's right to:

- (1) Consult with any persons the inmate reasonably desires;
- (2) Representation and assistance by counsel at the parole hearing;
- (3) Have counsel appointed to represent and assist inmate if the inmate so requests and cannot afford to retain counsel;
- (4) Be heard and to present any relevant information;
- (5) Assistance from a parole officer in preparing a parole plan and in securing information for presentation to the Authority

(c) The parole plan shall include information on the life the inmate intends to lead, how the needs of the

inmate will be addressed, where and with whom the inmate will reside, and occupation or employment. Responsibility for the development and validity of the parole plan rests with the inmate.

(d) The State shall have the right to be represented at the hearing by the prosecuting attorney who may present written testimony and make oral comments and the Authority shall consider such testimony and comments in reaching its decision. The Authority shall notify the appropriate prosecuting attorney of the hearing at the time the prisoner is given notice of the hearing

(e) The Authority shall prepare and provide the Department of Public Safety, the inmate and inmate's attorney with a written statement of its decision and order.

(f) When parole is granted, the Authority shall set the minimum length of parole term the inmate is required to serve. When parole is denied, the decision shall state the reasons for denial and the next parole hearing date.

(g) The Authority shall make a mechanical or verbatim stenographic record of each parole hearing. No record of subsequent discussions and deliberations need be made. [Eff AUG 22 1992] (Auth: HRS 353-62, 353-65) (Imp: HRS 353-65, 353-68, 706-670)

23-700-33 Information considered and criteria utilized in parole consideration. Parole shall not be granted unless it appears to the Authority that there is a reasonable probability that the inmate concerned will live and remain at liberty without violating the law and that the inmate's release is not incompatible with the welfare and

safety of society. Parole is not a right of an inmate or parolee. parole may be denied to an inmate when the Authority finds:

- (a) The inmate does not have a viable parole plan;
- (b) The inmate has been a management or security problem in prison as evidenced by the inmate's misconduct record;
- (c) The inmate has refused to participate in recommended prison programs;
- (d) The inmate's behavior in prison is a continuation of the behavior that led to the inmate's imprisonment;
- (e) The inmate has a pending prison misconduct;
- (f) The inmate does not have the ability or commitment to comply with conditions of parole;
- (g) The inmate has pending criminal charges which arose from inmate's current incarceration or last parole;
- (h) The inmate has a parole plan for a state that has not accepted the inmate for supervision; or
- (i) The inmate has expressed little or no interest in parole. [Eff AUG 22 1992] (Auth: HRS 353-62, 353-65) (Imp: HRS 353-65, 353-67, 353-69, 706-670)

23-700-34 Cash and clothing furnished paroled or discharged prisoners. Upon parole or discharge from the maximum prison sentence, an inmate, who has been committed or sentenced to one year or more, shall be furnished with funds and clothing as authorized by statute.

[Eff AUG 22 1992] (Auth: HRS 353-63, 353-65) (Imp: HRS 353-65, 353-67, 353-69, 706-670)

23-700-35 Actual release on parole. (a) Release on parole shall be conditioned on an inmate's written acceptance of the "Terms and Conditions of Parole" attached to these rules and regulations, and any special terms and conditions the Authority finds necessary to protect the welfare and safety of society and guard against future law violations.

(b) Parole may be deferred by the any member of the Authority should any significant and new information come to the attention of the Authority between the time of the decision to grant parole and the release date.

(c) When parole is deferred, the Authority shall notify the inmate in writing of the reason for deferral and afford the inmate a hearing.

(d) The Authority shall give written notice of the parole or release from parole of an inmate or parolee to each victim who has submitted a written request for notice or to a surviving immediate family member who has submitted a written request for notice.

(e) The Authority shall provide written notice to the victim or surviving immediate family members at the address given on the written request for notice or such other address as may be provided by the victim or surviving immediate family member, not less than ten days prior to parole or final unconditional release. However, the Authority, in its discretion, may instead give written notice to the witness or victim counselor programs in the prosecuting attorney's office in the appropriate county.

[Eff AUG 22 1992] (Auth: HRS 353-62, 353-65) (Imp: HRS 353-65, 353-66, 353-69, 706-670, 706-670.5)

23-700-36 Procedure following a deferral of parole.

(a) When parole is deferred, a hearing shall be held by the last day of the month following the month of deferral.

(b) At the hearing following deferral of parole, the inmate shall be given the opportunity to be heard, present information, and subject to security considerations, examine written materials.

(c) The inmate shall be given at least seven calendar days written notice of this hearing.

(d) The Authority shall inform the inmate of the inmate's right to consult with any persons the inmate reasonably desires, including the inmate's own counsel.

(e) The Authority shall inform the inmate of the inmate's right to be represented and assisted by legal counsel at the hearing.

(f) The Authority shall inform the inmate that counsel will be appointed to represent and assist the inmate if the inmate requests and states the inmate cannot afford to retain counsel.

(g) The Authority shall provide the Department of Public Safety, inmate and inmate's attorney with a written statement of its decision and order rescinding or granting parole.

(h) The written statement shall include the Authority's reason for its decision. [Eff AUG 22 1992] (Auth: HRS 353-62, 353-65) (Imp: HRS 353-65, 353-68, 706-670)

23-700-37 Computation of maximum parole time. (a) If a parolee's parole is revoked, the term of further imprisonment upon such recommitment and of any subsequent reparole or recommitment under the same sentence shall be fixed by the Authority but shall not exceed in aggregate length the unserved balance of the maximum term of imprisonment.

(b) Time spent in detention relative to a specific charge prior to commitment by the courts upon conviction of an offense shall be considered pre-confinement credits. Pre-confinement credits shall be deducted from the minimum and maximum terms. This standard applies only to those offenses committed since January 1, 1973. For offenses committed prior to January 1, 1973, pre-confinement credits apply only to the minimum terms.

(c) When a parolee's whereabouts is unknown or the parolee leaves the State without permission, the Authority may suspend that person's parole term until the parolee is in the custody of a law enforcement agency to be returned to the custody of the Department of Public Safety. That period of suspension shall be added to the parolee's aggregate parole term. [Eff AUG 22 1992] (Auth: HRS 353-63, 353-65) (Imp: HRS 353-65, 353-66, 706-670)

HALAWA CORRECTIONAL FACILITY
Special Needs Facility
MAXIMUM CUSTODY INMATE GUIDELINES
MAX I

Inmates are subject to all State of Hawaii laws, Department of Public Safety policies, and Halawa Correctional Facility (HCF) policies and procedures. Any deviation from these guidelines may be subject to a program hearing, disciplinary action and/or criminal charges.

All rules of these guidelines shall be considered a *direct order*.

The following are the guidelines for inmates programmed to the MAX I Custody Unit of HCF.

CONDUCT/BEHAVIOR

1. Inmates will not govern or order another inmate(s).
2. At no time will an inmate yell, whistle, etc., at any staff member. Inmates shall not use abusive or obscene language towards any staff member or other inmate.
3. All inmates are expected to display a respectful attitude and demeanor towards staff and visitors to the facility.
4. All inmates will obey all written and verbal orders given to them by staff.

SELF-REPRESENTATION

5. There will be no group representation. All inmates will be self-represented unless specifically authorized by the Warden.

FACILITY MOVEMENTS

6. Only one inmate at a time shall be allowed out of his cell when authorized or permitted. While out of his cell, he shall go directly to and from his authorized destination and not loiter, visit with other inmates, or in any way delay his return to his cell.
7. Whenever an inmate is authorized to be moved out of the unit, that inmate shall be leg-ironed and waist-chained at all times during his absence.
8. All inmates in the unit shall be strip-searched upon leaving and returning to the unit.
9. Inmates must be properly dressed in HCF uniform and footwear must be worn at all times when leaving the unit, except for legitimate reasons. (Exceptions: Uniforms do not have to be worn at recreation and upon being escorted to court jury trials.) Inmates will be dressed in uniform or shorts within the unit.
10. All unit doors shall remain locked at all times unless authorized or permitted to be opened by staff.

11. During medication, the inmate will walk directly to the gate from his assigned cell. Upon accepting medication, the inmate will immediately swallow it and allow the nurse to check his mouth.
12. Inmates will be appropriately dressed when out of their cells except when going to the shower. Pants or athletic shorts and footwear are considered appropriate.

SPECIAL HOLDING STANDARDS

13. Blankets, sheets, pillows, pillow cases, laundry bags, and mattresses shall be kept on the inmate's respective bed.
14. Any personal property left in the central and shower areas will be confiscated. A write-up will be issued.
15. Inmates are not authorized in another inmate's cell and inmates are not to allow the other inmates into their cells.
16. Only one inmate shall shower at a time. Showers are not permitted during meals or headcount. An inmate, when going to and from the shower, must be covered with at least a towel unless he is behind the shower curtain and out of view. Inmates are not allowed to soap themselves or dry off outside of the shower stall.
17. There will be no exercising in the inmates' assigned cells. Exercises prescribed for medical reasons will be done at recreation.

18. No items shall be given by an inmate to an ACO to be passed to another inmate.
19. No defacing of walls, windows, fixtures, and equipment. Nothing may be hung on the cell walls. No pasting of pictures, etc. on the beds.
20. There will be no obstruction to the see-through glass (windows) on the cell, windows, light fixtures, and vents.
21. Stringing of clothes lines shall not be permitted.
22. All dayroom lights and all cell lights will be turned off at 1000 hours. Lockdown will be completed by 1000 hours. All lights will be turned back on at 0530 hours. Security lights will remain on all night.
23. Inmates are responsible for keeping their cells clean, orderly, and ready for inspection at all times.
24. Inmates shall not pass any items under their cell door to another inmate under any circumstances. Inmates will not pass items during movements.
25. Cardboard boxes, plastic containers, plastic bags, glass containers, cans, or any implement of storage shall not be permitted or stored in an inmate's cell. (Exception: Dentist/Unit Team approved containers for dentures.)
26. Inmates shall not save or store any seed and chip packages, candy wrappers, etc.

27. One religious medal with chain and one wedding band may be permitted upon inspection for suitability by the Unit Team.
28. Instruments of music shall not be permitted in the cell.
29. No inmate shall have money in his possession. All money will be considered contraband and subject to confiscation. There will be no transferring of money from one HCF inmate account to another.
30. The toilet shall not be used as a disposal of discarded items. No item authorized for retention shall be flushed through the toilet except toilet paper.
31. Horseplaying (pushing, shoving, etc.) is not allowed at any time.
32. Inmates shall not use abusive or obscene language towards any staff member. Inmates shall not talk or make noise while staff members and visitors are in the inmate housing area.
33. Inmates will not make unreasonable noise or harass others. They will not use abusive or obscene language or crude gestures to others which might provoke a response.
34. Sweatshirts are to be worn only in the cells or in the recreation yard.
35. Television privileges shall not be permitted.

36. Radios, tape recorders, and all electronic entertaining devices shall not be permitted for personal retention.
37. Inmates shall not yell, shout or cause a disturbance of any type unless an emergency situation exists.
38. Inmates shall not pound, shake, rattle or kick their cell doors.
39. Inmates shall not deliberately flood their cell.
40. Recreational games shall not be permitted for use or retention. Inmates shall not make or have any type of recreational games (i.e., chess or checker boards and pieces, playing cards of any sort, crossword puzzles, hangman, etc.).
41. Inmates shall not be in possession of carbon paper or use carbon paper other than for authorized purposes. Inmates shall not rip, tear or remove carbon paper from any documents.

MEALS

42. All meals will be consumed inside the cell upon distribution of food trays by the ACOS.
43. After each meal, all trays will be put in an orderly fashion outside of the cell. *No food will be stored in the cell.*

AUTHORIZED ITEMS FOR RETENTION

Except for the items listed below, nothing else is permitted for retention by the inmate in his cell unless specifically authorized by the Unit Team. All excess personal items will be kept in the inmate's property storage area for no more than 30 days. Arrangements by the inmate shall be made for it to be sent out from the facility (via family, friends or mail). Excess property may be picked up on Mondays through Fridays, except on holidays, from 0800 hours to 1530 hours. Property held in excess of 30 days shall be donated to charity.

Authorized items for retention, as herein listed and reflected in the Inmate Inventory List of Authorized Inmate Property, shall not be altered or used other than the way they were intended to be used. All store order items shall be purchased on a trade-for-trade basis.

All hygiene items must be obtained via the inside store order or facility issue.

44. One tube toothpaste and one toothbrush.
45. One lotion.
46. Three bars of soap.
47. One deodorant, solid stick or roll-on.
48. One plastic bottle of shampoo or shampoo/conditioner.
49. One comb (HCF approved).
50. One roll toilet paper.
51. Dental floss (50 yards).

52. Any medical items for retention must have prior medical approval and proper labeling and identification.
53. Perishable inmate store-bought items: Limits as set on the store order forms.
54. Two towels and two washcloths.
55. One mattress.
56. One blanket.
57. Two sheets.
58. One pillow.
59. One pillow case.
60. One sweatshirt (through inmate store order).
61. One pair slippers (HCF issued or through inside store order only).
62. One pair of athletic shoes (through inmate store order).
63. Five issued white t-shirts, six personal t-shirts (white, no pockets); no tank tops.
64. Five issued white boxer undershorts; six personal undershorts-boxer/brief/white.
65. Six personal pairs of tube socks.
66. Three athletic shorts (solid color, no pockets, no drawstrings, no white or off-white).
67. One issued laundry bag without a string.
68. Two issued uniform pants (orange). Two issued uniform shirts (orange).

69. Manila envelopes may be purchased for immediate use by inmates with pending legal cases upon approval of the Unit Manager. Indigent inmates with pending legal cases may request that the cost of the envelopes be debited to their account.
70. One pencil. (Pens for legal work must be requested from staff. When approved, pens shall be provided according to a reasonable schedule and commensurate with the inmate's legal needs.)
71. Indigent inmates may request four (4) sheets of writing paper from staff.
72. One tablet of writing paper (with or without lines, not to exceed 8-1/2" x 11" - issued through inside store order only). Indigent inmates with pending legal matters may request that the cost of the tablet be debited to their account. Cardboard will be removed.
73. One package of 75 letter or legal size envelopes (through inmate store order).
74. Stamps (through inmate store order) maximum of two books (40 stamps).
75. Twelve photographs (not to exceed 4" by 6").
76. Five incoming correspondence (letters/greeting cards).
77. One issued pocket-size calendar.
78. One Bible (Koran, Toran, Book of Mormon, etc.).
79. One *Inmate Handbook*.

80. One "Max I Inmate Guidelines."
81. Ten reading materials - i.e., magazines, library books, educational materials, legal materials. (Inmates approved by the Unit Team to participate in educational, recreational and religious program activities, and/or have pending legal cases, may keep in their possession a *maximum* of 10 books.).
82. Daily newspaper - no more than three daily newspapers may be kept in cell at any given time. Proper disposal of the newspapers is required.
83. One wedding ring (registered).
84. One neck chain with religious medallion (registered).

Authorized items for retention, as herein listed, shall not be altered or used other than the way they were intended to be used. All store ordered items shall be purchased on a trade-for-trade basis.

With the approval of the Unit Team, inmates may subscribe to a maximum of four (4) publications and to the daily newspaper in accordance with established procedures.

Court clothes and funeral/parole attire (1 set which may include: 1 pair of trousers, 1 dress shirt, 1 pair of dress shoes, and 1 pair of dress socks) will be accepted with prior approval. The set may be exchanged should there be valid reasons to do so. Within two (2) weeks after the completion of the event, inmate makes arrangements to have his clothes sent out of the facility or the clothes will be donated to charity unless otherwise authorized.

All HCF issued property is the inmate's responsibility. Any damage, loss, etc., to issued property may result in a misconduct report being filed against the inmate assigned the property which may include his having to pay for the property.

PROHIBITED ITEMS

85. Inmates found in violation of any stipulations as reflected in the Inmate Inventory List of Authorized Inmate Property shall be subject to an Incident Report and/or possible misconduct.
86. Anything not specifically authorized for possession, conveyance or introduction onto the HCF compound by the Warden shall be considered contraband. Inmates violating this section shall be subject to appropriate disciplinary sanctions which may include criminal charges.
87. Inmates are not allowed to hoard personal or perishable items and are authorized to keep in his possession only the maximum limit of each item.

COMMUNICATION

88. All requests will be in writing except for emergency situations.
89. The staff shall be immediately informed of any medical emergency. All medical appointments will be scheduled through the facility nurse by submitting a request. No inmate shall possess any medication

except as authorized by the Medical Unit with approval of Administration.

90. ACOs will accept requests from the inmates once daily in the morning (0700 hours).
91. Inmates shall communicate in the English language only including telephone calls, visits and letters.

Exception: A written request must be submitted and approved by the Unit Team for an inmate to speak a foreign language to a non-English speaking family member.

VISITS

92. *Official Visits* shall be permitted at any reasonable hour in accordance with applicable department and facility policies. Official visitors are encouraged to make prior appointments with the facility.
93. *Personal Visits* are a privilege that shall be limited to one (1) one-hour non-contact visit per week. Visitors must have prior approval via the inmate visitation cards. Requests for visits must be made in writing by the Maximum Custody inmate to the caseworker no less than three (3) working days prior to the date of the proposed visit. The visit must be approved by the Unit Team before it may be scheduled. Visits will be limited to immediate family per facility procedure.

Denial of such visits will be for cause. The reasons for denial will be furnished in

writing to the inmate. Where confidential information is involved, a general summary will be for the safety, security, and good government of the facility only. The prospective visitor's criminal record, if any, will be considered.

Non-immediate family and friend visitors will be permitted to visit only one Maximum Custody inmate.

94. *Special Personal Visits* will be limited to those person(s) living off-island only. If they are unable to visit during regular visits as scheduled, they may request ahead of time for a special visit which will be for one-hour during the weekdays and during business hours. Roundtrip airline tickets must be presented as verification of off-island status and the actual dates of stay on Oahu.

Special visits shall be limited to no more than three (3) visitors and shall be scheduled during the week unless otherwise authorized by the Unit Team and the Warden.

A request for special visit shall be submitted on an inmate request form stating the following information: complete name(s) of visitor(s); their relationship; date of birth or Social Security Number; and length of stay on Oahu.

Requests for special visits are to be submitted a minimum of five (5) working days before the proposed visit is to take place.

CORRESPONDENCE

95. Incoming or outgoing mail to and from inmates will be inspected and read. Privileged mail, as described by the *Inmate Handbook*, should normally be inspected for contraband in the presence of the inmate. Outgoing privileged mail will be stamped by the ACO. Incoming personal mail maybe withheld from the inmate for up to 15 days and outgoing personal mail may be restricted for up to 15 days in accordance with the provisions of the *inmate Handbook* regarding punishment sanctions.

OUTGOING MAIL

96. The name and address of the inmate must be on the front upper left hand corner of the envelope. The name and address, including zip code, of the recipient must be on the front of the envelope in the center.
97. Proper postage is to be affixed on the upper right hand corner of the envelope. If the postage is incorrect, the mail will be returned to the inmate with a note showing the amount of postage required before the mail is sent out.
98. All outgoing mail will be picked up from the quads daily at lockdown, 2130 hours.
99. all outgoing letters must have the inmate's commitment name and return address on the envelopes.

INCOMING MAIL

100. The ONLY authorized items inmates may receive in the mail are letters, signed postcards and greeting cards, photographs, money orders/cashiers checks, xerox copies, newspaper clippings, religious material direct from a publisher or church, and all approved subscriptions to magazines/books. ALL other items such as catalogs, stamps, brochures, bookmarks, stickers (both loose and pasted on letters or envelopes), blank stationery [sic] and envelopes are considered unauthorized items. Any other item received requires a case manager's approval prior to being sent to the inmate.
101. Checks and money orders must be made payable to HALAWA CORRECTIONAL FACILITY with the inmate's name indicated.
102. Incoming inmate mail must have the sender's name and return address or it will be considered unauthorized personal property. Inmates will NOT have access to unauthorized property and will make arrangements to dispose of this property within thirty (30) days. After thirty (30) days, the property clerks have been advised to dispose of the unauthorized property according to HCF guidelines.
103. There is no restriction on the amount of *incoming personal letters* but inmates are allowed to keep only five (5) personal letters and twelve (12) photographs in their possession.

104. Incoming and outgoing greeting cards are not to exceed 8 1/2" by 11". Cards larger than this will be considered unauthorized property.
105. All incoming inmate mail will be required to show the inmate's commitment name and housing assignment as part of the address.
106. Each inmate will be responsible for informing their families, friends, and acquaintances of these stipulations.
107. Correspondence between inmates in other correctional facilities may be allowed with prior approval of both facilities' wardens.
108. Inmates will be responsible for the purchase of writing materials through the inmate store order.

LIBRARY

109. Recreational library services will be provided once a week per schedule. Law Library appointments will be scheduled by the librarian via a request.
110. Inmates will return all library books prior to their transfer to other facilities. Inmates will not give their library books to other inmates and missing books may be debited to their account. No library books will be placed in personal property. Any books left in the common area will be confiscated and given to the librarian.

LAUNDRY

- 111. Laundry services are provided twice a week as scheduled.
- 112. Blankets will be cleaned and mattresses will be sanitized at least once a month as scheduled.
- 113. All clothing will be marked with assigned laundry numbers to assure proper return after laundry days.

TELEPHONE PRIVILEGES

- 114. *Personal telephone calls* - Inmate personal telephone calls will be allowed in accordance with the prescribed scheduling. Incoming personal telephone calls are not permitted. Personal calls will be collect calls with the debt placed on the bill of the receiving party. No pens, pencils or writing material such as note paper, etc., will be allowed out of the quad during personal phone calls. Wonderphone/smart phone calls are not allowed.
- 115. *Attorney telephone calls* - Inmates shall request permission in writing to communicate by telephone on legal matters. The request shall be addressed to the Warden. The request must explain the need to communicate by phone in lieu of using other means of court access such as personal visits by their attorney, communication by mail or use of the Law Library for research.

Telephone calls on legal matters shall be restricted to three calls per week. This

includes local and long distance calls. Each telephone call may be limited to five (5) minutes duration. Pro Se inmates shall receive no special dispensation from this provision. They shall be provided the same means of access to the courts that are provided to all inmates.

The costs of the phone calls shall be debited from the inmate's spendable account unless they make the call "collect." Accounts will be debited even if there are insufficient funds in the account to cover the cost of the call at the time it is made.

- 116. *Ombudsman calls* - Telephone calls to and from the Ombudsman shall be permitted at any reasonable hour without delay.
- 117. *Hawaii Paroling Authority* - Inmates will not be allowed to call their parole officers unless the parole officer has given prior clearance to the Case Manager.
- 118. *Internal Affairs Office* - Inmates may contact the Internal Affairs office directly by telephone. The I.A.O. will screen all inmate telephone calls and determine whether the inmate has a legitimate reason to call. Inmates may also correspond with I.A.O.
- 119. *Other official calls* - Calls to the Police Department, State or Federal agencies, residential treatment programs, child protective services, family support services, family court, etc., require prior approval of the Unit Manager, Sergeant, or Case Manager.

Wonderphone, third party, conference, party line and speaker phone calls are not allowed. Inmates will speak with only one person at a time.

STORE ORDERS

120. Inmates shall be permitted outside store orders as scheduled, Orders will be limited to an amount approved by the Warden. Athletic shoes will be purchased separately through a request to the inmate store manager.
121. Inside store orders shall be permitted once a month as scheduled. Orders will be limited to an amount approved by the Warden.
122. All personal items not issued will be bought through store order only.

EXERCISE PERIOD

123. Inmates shall be allowed to have a 60-minute outdoor exercise period on weekdays as scheduled excluding holidays, unless compelling security or safety reasons dictate otherwise.
124. The recreation yards have out-of-bounds areas marked with red lines. Inmates will remain within authorized areas only.
125. Water fountain in the recreation yard shall not be used for the purpose of washing up, showering, or urination.

126. There will be no climbing on the recreation yard fence or walls and inmates shall not place feet on walls.
127. Inmates shall not write, scratch, etch or deface the doors, windows, walls, floor or any other area in the recreation yard.
128. Inmates shall not talk, yell, shout or converse with any other inmate while at recreation.

SMOKING PRIVILEGES

129. The Maximum Custody Unit will be a non-smoking area. Cigarettes, tobacco and smoking paraphernalia will not be permitted.
130. Inmates will not request for cigarettes from staff. Cigarettes will not be permitted in the law library or the medical, dental or psychiatric offices.

INCOMING/OUTGOING PERSONAL ITEMS

131. Inmate transactions regarding court clothes and funeral attire will be done during the weekdays, except holidays, between 0800 hours and 1530 hours with prior approval.
132. Requests for these kinds of transactions require at least three (3) working days prior written notice and approval. Inmates shall submit inmate request form to their respective case manager stating items to be picked up or dropped off and by whom.

133. No books or magazines may be brought in via family and friends.

GROOMING STANDARDS

134. Grooming standards include washing, brushing teeth, combing hair, and attending to personal needs.
135. Inmates are encouraged to shower and shave regularly. Inmates will be given the opportunity to shower at least five (5) times per week for a time not to exceed ten (10) minutes unless compelling security or safety reasons dictate otherwise. No toothbrush or comb will be brought out of the inmate's cell.
136. Inmates are scheduled for haircuts at least once a month when equipment is made available.
137. Razors will be provided to inmates for use in their cell for a time not to exceed five minutes, five times per week. Disposable razors shall be provided weekly by staff for each inmate's individualized use.
138. Hair styles shall be in accordance with traditional standards of taste and the hair maintained in a neat and presentable fashion at all times.
139. Extreme hair styles such as modern styles or colors, unkept hair, and exaggerated sideburns are unacceptable. Hair that is excessively long in the front, side, or back of the head is not considered appropriate. Hair length shall not touch the shoulders.

Braids and/or cornrows are not authorized.

140. Inmates shall not be allowed to have a "shaved head" haircut unless approved by the Warden or his designee.
141. Beards and mustaches may be allowed if they are short, trimmed, clean, and groomed. Cleanliness, sanitation, security, and safety of the inmates will be taken into consideration. Beards will not be more than 1/2 inch from the face or longer than one (1) inch from the chin.
142. Sideburns shall not extend below the tip of the ear lobe and shall be trimmed level. The forward and rear edge of the sideburns should be maintained following the natural hairline. Extreme styles such as "mutton chops" are not permitted.
143. Tattooing is prohibited.
144. Fingernails shall be maintained at a length that will not present a hazard to security and health.

MONEY

- 145.. Monetary donations will only be accepted for inmates from persons on the approved inmate visitation list. The inmate will incur all postage costs to have the money order, check, etc., returned to the sending party if the incoming monetary donation is deemed unauthorized.

146. There shall be no checks drawn on any inmate account for any reason other than the following:

Reimbursement of personal collect telephone calls up to \$25.00. All checks will be made out directly to Hawaiian Telephone upon receipt of appropriate verifications.

Court ordered payments: i.e., restitution, fines, etc.

Magazine subscriptions with prior approval from he [sic] Unit Team.

147. Incoming money may be accepted through the mail in the form of money orders or cashier's checks only. Incoming money (money orders, cashier's checks and cash) may be brought to the facility on Mondays through Fridays, excluding holidays, between 0800 hours and 1600 hours. Personal checks will not be accepted at any time.
148. All checks and money orders, shall be made out to the "HALAWA CORRECTIONAL FACILITY" and indicate the inmate's commitment name.

105s

149. An accumulation of five (5) various negative 105s or write-ups within a six (6) month period may result in the inmate facing the program Committee for possible revocation of privileges.
150. When an inmate incurs two similar types of negative 105s within a six-month

period, then that inmate may be subject to a misconduct and disciplinary actions [sic].

DRUG DETECTION PROGRAM

151. As indicated in facility policy, drug screen testing may be done for cause or as part of a random screening program conducted at regular or irregular intervals to effectively control the unauthorized use of drugs of all types and the abuse of medicinal substances for other than medical use in efforts to provide a safe and secure atmosphere for the mutual benefit of all personnel and all inmates.

The "Maximum I Custody Unit Guidelines" may be revised, modified or amended without prior notice to the inmates upon approval of the Warden. They become effective upon approval.

Approved:

/s/ Guy Hall
Guy Hall, Warden

06/16/94
(MAX1LINE)

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Supreme Court, U.S.
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No. 93-1911

In The
Supreme Court of the United States
October Term, 1994

CINDA SANDIN, Unit Team Manager,
Halawa Correctional Facility,
Petitioner,
vs.

DeMONT R.D. CONNER,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Whether Hawaii regulations that require a finding or admission of guilt of "serious misconduct" before disciplinary segregation may be imposed as a punishment create a liberty interest under the Due Process Clause.

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For The Ninth Circuit
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RESPONDENT'S BRIEF
—◆—

STATEMENT OF THE CASE

A. Introduction.

As this Court underscored in *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974), "[t]here is no iron curtain drawn between the Constitution and the prisons of this country" and "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime."

In this case the State of Hawaii seeks to eviscerate constitutional due process protections in a wide range of cases in which prisoners seek essential guarantees of

procedural fairness when state laws provide liberty interests as this Court has defined them in cases following *Wolff*. This radical request to abandon long-established due process jurisprudence is unwarranted under any circumstances. It is especially unwarranted in the context of the issues presented in this case.

B. Background of the Litigation.

1. The August 13, 1987, Incident.

Respondent, DeMont Conner, was incarcerated in Halawa Correctional Facility ("HCF") starting in September 1985. By the end of 1986 Respondent had made excellent progress at HCF; the Administrator of the facility noted "a remarkable change in his attitude and behavior." [J.A. 101]. He consistently received favorable evaluations at his work assignment. [J.A. 102-124].

Respondent was assigned to the general population at the time of the August 13, 1987, incident which is the subject of this case. [CR 83, Exhibits "C" and "K"]. He had the opportunity to work and participate in educational and other programs at the facility. [J.A. 101]. Between his September 3, 1985 arrival at HCF and the August 13, 1987, incident, Respondent was found guilty of only one other incident of misconduct on January 1, 1987. [J.A. 369; CR 83, Exhibit "J"]. He received a 30 day sentence of disciplinary segregation for fighting with another inmate. This sentence was completed by January 30, 1987. After the expiration of this sentence Respondent was assigned to Phase I status, a form of administrative

segregation in operation at the time,¹ but this status was reviewed after only 8 days and he was placed back in the general population. [J.A. 237]. It appears that the August 1987 incident at issue in this case led to a spiral of disciplinary issues between Respondent and prison authorities. [J.A. 237-242].

The August 13, 1987, incident itself began when Respondent left his cell to attend a religious session. [J.A. 93]. Adult Corrections Officer ("ACO") Furtado ordered Respondent to go through a strip search procedure in a way Respondent believed was abusive and degrading. [Pet. App. A63]. Sergeant Summers was present during the incident and cancelled Respondent's religious visit and ordered him to be returned to his cell.

Shortly after the August 13, 1987 incident ACO Furtado filed a report of Respondent's alleged misconduct. [Pet. App. A61]. Another officer, ACO Johnson conducted a brief investigation of the incident and filed a report that was submitted to the prison Adjustment Committee. [Pet. App. A61-63]. Respondent was notified of the charges against him and given the opportunity to appear at an August 28, 1987, hearing before an Adjustment Committee chaired by Petitioner. Respondent acknowledged that he complained to Furtado about the harassment he experienced during the incident but Respondent denied at all

¹ Petitioner notes that Phase I status is no longer in operation at HCF. [Pet. Br. 6 n. 3]. Respondent agrees with Petitioner's contention that this case is not moot because of this change in the rules relating to administrative segregation. In Respondent's view, this case concerns only issues of the punishment of disciplinary segregation for misconduct.

times that he had engaged in conduct that would justify a finding of "serious misconduct." [Pet. App. A63].²

2. The August 28, 1987, Hearing.

Under Title 17 of the regulations governing the corrections division of the Hawaii Department of Social Services and Housing, inmates are intended to have all of the "rights" set forth in subtitle 2 of these regulations governing the "adjustment process." These regulations provide for "punishment" only for "specific rule violations."

Sections 17-201-6 to 17-201-11 set forth prohibited acts amounting to "greatest misconduct" (§ 17-201-6), "high misconduct" (§ 17-201-7), "moderate misconduct" (§ 17-201-8), "low moderate misconduct" (§ 17-201-9), "minor misconduct" (§ 17-201-10), and "adjustments" (§ 17-201-11). [Pet.Br. 7-16].

Respondent was charged with using "physical interference or obstacle resulting in the obstruction, hinderance, or impairment of the performance of a correctional function of a public servant," a high misconduct offense. [Pet. App. A65]. He was also charged with using "abusive or obscene language to a staff member" and engaging in "[h]arassment of employees," both "low

² Respondent also contended that Sergeant Summers, the officer on the scene who cancelled his religious visit, was harassing him because of the legal assistance Respondent was providing to other inmates. [J.A. 93]. It is not clear whether prison officials ever considered this allegation of retaliation.

moderate" misconduct charges. [Pet. App. A66]. Respondent received notice of these charges on August 25, 1987. [J.A. 45].³

The hearing took place on August 28, 1987. [J.A. 46]. Respondent was present and pled not guilty to all charges. Apparently, no prison staff testified at the hearing. The Adjustment Committee relied on the written reports made by Officers Furtado and Johnson. [Pet. App. A67].⁴

Respondent was not permitted to call staff witnesses he asserted would clear him of the charges. [Pet. App. A66]. The only reason given for the refusal to allow Respondent to call staff witnesses was Petitioner Sandin's written statement that "[w]itnesses were unavailable due to move to the medium facility and being short staffed on the modules." [Pet. App. A67].

Respondent was found guilty of all of the misconduct charges filed against him and was sentenced to 30 days disciplinary segregation on the high misconduct charges, as provided in § 17-201-19. [Pet. App. A66]. He received four hours disciplinary segregation on the low moderate misconduct charge. [Pet. App. A66]. He served the 30 days.

³ Officer Furtado's report is dated August 13, 1987. [Pet. App. A61]. Officer Johnson's report on his investigation into the incident is dated August 14, 1987. [Pet. App. A62-63]. There is no explanation in the record concerning the reason for the delay between August 14 and August 25 in notifying Respondent of the charges against him.

⁴ There is no transcript, tape or other record of the proceeding.

Respondent filed an administrative appeal under § 17-201-20(a). On May 16, 1988, *after* Respondent filed this federal civil rights action in March 1988, Deputy Administrator Pikini overturned the Adjustment Committee's findings of high misconduct and expunged those charges from his record. [Pet. Br. 15]. Respondent had already served the entire sentence on the high misconduct charge. The findings of "low moderate" misconduct remain on his record.

C. The Hawaii Prison Disciplinary Regime.

Hawaii's prison regulations limit the administrator's discretion to impose disciplinary segregation for "serious misconduct" in the absence of a finding or an admission of guilt. The regulations provide for "punishment" only for "specific rule violations." § 17-201-4. Punishment for a "serious rule violation" may not occur absent a finding or admission of guilt. §§ 17-201-12 through 17-201-20. Section 17-201-18(b) states that a "finding of guilt *shall* be made where:

- (1) the inmate or ward admits the violation or pleads guilty; or
- (2) the charge is supported by substantial evidence." (Emphasis supplied).

There appears to be no way in which punishment for misconduct may lawfully be imposed under the Hawaii regulations without a prior finding or admission of guilt of a "specific rule violation." Thus, inmates in Hawaii prisons have a legitimate expectation based on the explicit mandatory language in Hawaii's regulations that

they will not be found guilty of misconduct or punished as a result of such a finding unless there is "substantial evidence" of their guilt of specific misconduct.

In addition, Hawaii's regulations provide mandatory procedures for determining whether an inmate has violated a rule. An inmate accused of "serious misconduct,"⁵ "shall" be punished only pursuant to the procedures in §§ 17-201-13 to 17-201-20. [Pet. Br. 16-24]. The regulations provide for notice and a hearing before an unbiased adjustment committee normally composed of three members. [Pet. Br. 16-18]. The inmate "shall" receive prior notice of the hearing. § 17-201-16(a). The inmate "shall" be served with written notice of the time and place of the hearing and the specific charges, including a brief notation of the facts not less than twenty-four hours before the hearing. § 17-201-16(b). The inmate or counsel substitute "shall" have the opportunity to review all relevant non-confidential reports of misconduct during the period between the notice and the hearing. § 17-201-16(c). The misconduct report "shall" contain specific information about the charge, the facts and witnesses. § 17-201-16(d).

Unless institutional safety or the good government of the facility would be jeopardized, an inmate has a "right to appear" at the hearing. § 17-201-17(a). An inmate has a "right" to remain silent. § 17-201-17(c). Subject to specific limitations an inmate has the "right" to confront and

⁵ "Serious misconduct" is defined as a "serious rule violation . . . which poses a serious threat to the safety, security, or welfare of the staff, other inmates or wards, or the institution and subjects the individual to the imposition of serious penalties such as segregation for longer than four hours." § 17-201-12.

cross-examine witnesses against him. § 17-201-17(e). An inmate has a "right" to respond to the evidence introduced against him, § 17-201-17(f), and "shall" be permitted to employ substitute counsel. § 17-201-17(g).

Under § 17-201-18(a) an inmate has a "right to be apprised of the findings of the Adjustment Committee." The Adjustment Committee may "render a decision based upon evidence presented at the hearing to which the individual has an opportunity to respond or any cumulative evidence which may subsequently come to light . . ." § 17-201-18(b). However, "disciplinary action shall be based upon more than mere silence." *Id.*

Under § 17-201-19, the Adjustment Committee may render "sanctions commensurate with the gravity of the rule and the severity of the violation." The specific punishments are set forth in this section and in the provisions defining each level of offense in §§ 17-201-6 to 17-201-11.

Section 17-201-20(b) permits the Administrator to initiate a review of the Adjustment Committee's decisions and to modify the Committee's findings or decisions. However, nothing in this section authorizes the Administrator to ignore the Committee's findings or decisions, as Petitioner claims, or to impose punishment in the absence of a finding of guilt or admission of misconduct.

D. This Litigation.

1. Proceedings in District Court.

Respondent filed his original complaint on March 14, 1988. [J.A. 20]. In its Order Granting In Forma Pauperis Application, the District Court recognized that due process was required for the imposition of sanctions for major misconduct based on *Wolff v. McDonnell*, 418 U.S. 539 (1976). [J.A. 25-26]. Petitioner Sandin was named as a defendant in the initial complaint. On May 3, 1988, Respondent moved to amend his complaint to add additional defendants and to add a request for injunctive relief, in addition to the declaratory relief and damages he sought in his initial complaint. [J.A. 27-29].

Between March 1988 and September 1991 the parties litigated a variety of claims in the district court. In September 1989 Respondent filed a second amended complaint raising additional claims,⁶ including claims that he was being subjected to a campaign of harassment and retaliation in response to his activities as a jailhouse lawyer. [J.A. 169-194]. In December 1988, Respondent won a preliminary injunction guaranteeing his access to the law library but failed to obtain interim injunctive relief on other claims. [J.A. 66-71].

On May 21, 1991, the Magistrate issued his Report and Recommendations Granting Defendants' Motion For Summary Judgment. [J.A. 325-352]. The district court approved the Magistrate's Report and entered summary

⁶ Respondent continued to assert his due process claims arising out of the August 13, 1987, incident in his amended complaint. [J.A. 251].

judgment against Respondent on all of his claims on September 30, 1991. [Pet. App. A21-A38].⁷

2. Proceedings in the Court of Appeals.

The Court of Appeals affirmed the District Court's Order in all respects except for two issues. The court overturned the District Court's summary judgment on Respondent's First Amendment claim that his religious freedom was impaired by restricting prayers in Arabic. This ruling was not the subject of the Petition and the prison authorities have repealed the rule under which Respondent was disciplined. [Pet. Cert. 9].

The Ninth Circuit also reversed the District Court's summary judgment on Respondent's claim that he was denied due process at the August 28, 1987, hearing. The Court of Appeals found that the record disclosed a genuine issue of material fact as to whether Respondent was denied due process because Petitioner Sandin did not explain why Respondent was not permitted to call staff witnesses who he contended would support his defense to the charge of high misconduct. [Pet. Cert. A3-A9]. The court determined that the issue of whether Petitioner Sandin was entitled to qualified immunity in these circumstances could not be decided without a fuller development of the record.⁸ [Pet. Cert. A9].

⁷ Respondent represented himself in both the District Court and Court of Appeals. Respondent is represented by counsel for the first time before this Court.

⁸ Because this Court's October 7, 1994, Order limits this proceeding to the first Question Presented by Petitioner,

The Ninth Circuit, applying this Court's precedents, found that the Hawaii regulations granted Respondent a "liberty interest" in remaining free from disciplinary segregation unless there was substantial evidence that Respondent was guilty of an act of misconduct justifying disciplinary segregation under the regulations. Based upon this finding, the Court of Appeals remanded the case for further proceedings in the District Court.

SUMMARY OF ARGUMENT

1. The Ninth Circuit's judgment is hardly remarkable. It is based on the core principle firmly established in *Wolff, supra*, 418 U.S. at 571 n.19, that a prisoner may not be punished for misconduct by disciplinary segregation in the absence of procedures satisfying the Due Process Clause. This Court has held that prisoners have a liberty interest protectible under the Due Process Clause whenever explicitly mandatory language in connection with specific "substantive predicates" in state prison regulations limit official discretion. *Hewitt v. Helms*, 459 U.S. 460, 472 (1983).

a. Hawaii's prison regulations governing the imposition of discipline give rise to a "liberty interest" because prisoners may only be punished, by segregation or otherwise, if they are found guilty of or admit to specific misconduct as defined by Hawaii law. The

Respondent will not address the qualified immunity issue or the issue of what process was due Respondent if a "liberty interest" is found.

Hawaii discipline regulations are a paradigm of "substantive predicates" limiting official discretion. Although under Hawaii law the warden may modify Adjustment Committee decisions or findings, punishment may *only* be imposed after a substantive finding or an admission of misconduct. Thus, Hawaii prisoners have a legitimate expectation that they will not suffer disciplinary punishment unless they are found guilty of specific misconduct defined in Hawaii law. The Due Process Clause requires that these legitimate expectations be safeguarded by fair procedures.

b. Petitioner's contention that *Kentucky Dep't. of Corrections v. Thompson*, 490 U.S. 454 (1989), adds an additional requirement that a prisoner *always* be punished under Hawaii law before a liberty interest exists misreads that decision. The denial of the prisoner's claims in *Thompson* occurred because the visiting regulations in that case placed no substantive limitations on the discretion of prison officials. Furthermore, the limitations in Hawaii law are not merely procedural. The requirement of "substantial evidence" of guilt of misconduct is inextricably tied to a substantive finding of specific misconduct.

c. Petitioner's argument that because Hawaii prisoners may be placed in administrative segregation under conditions similar to the conditions of disciplinary segregation undermines Respondent's expectation of freedom from disciplinary segregation without a finding of misconduct is inconsistent with this Court's cases. Under this Court's cases states may create liberty interests in the context of disciplinary segregation, while placing no such limitations on the use of administrative

segregation. Even if the conditions imposed upon an inmate under discretionary administrative classification decisions are found to be similar to those resulting from disciplinary segregation, a prisoner's interest in avoiding disciplinary segregation is still one of "real substance" requiring Due Process. *Wolff, supra*, 418 U.S. at 557. Not only does disciplinary segregation entail adverse living conditions and loss of privileges, the punishment has enormous potential collateral consequences, including possible adverse consequences for parole.

d. The holding in *Wolff* is not limited to disciplinary procedures that inevitably result in the loss of good time credit or other lengthening of confinement. In *Wolff* a liberty interest was found even though the Nebraska regulations in that case provided for sanctions as minor as a reprimand for misconduct. In *Hewitt*, this Court unanimously found a liberty interest to exist even though the Pennsylvania administrative segregation regulations did not have any effect on the duration or nature of confinement as such, nor did administrative segregation have any impact on parole decisions.

e. Even if the Court accepted Petitioner's suggestion that a "bright line" should exist that allows prison administrators complete discretion to engage in arbitrary punishment so long as the duration of a prisoner's sentence is not directly affected, this case should still be governed by *Wolff* and its progeny. Under Hawaii law parole may be denied to an inmate when the Hawaii State Paroling Authority finds that the inmate's misconduct record shows that he has been a management or security problem in prison. Also, even after a parole has been granted, it may be rescinded prior to release if the

Authority receives new information regarding misconduct. Thus, in Hawaii, the inmate's misconduct record plays a role in the Hawaii regulatory scheme substantially identical to the system before this Court in *Wolff*, which permitted but did not require the deprivation of "good time" upon a finding of misconduct.

f. The Ninth Circuit's recognition of a liberty interest in avoiding disciplinary segregation in the absence of "substantial evidence" of specific misconduct flows naturally from this Court's decisions in *Wolff* and *Hewitt* and represents no radical new federal intrusion into day-to-day prison administration. Principles of federalism are not undermined by recognition of liberty interests found in Hawaii's prison regulations.

g. The Court's decisions in *Wolff* and *Hewitt* created a body of precedent and settled expectations throughout the country that should not be lightly abandoned. *Planned Parenthood v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 2808 (1992). None of the justifications for overruling this Court's precedents exist in this case.

2. Apart from the "substantive predicates" of Hawaii law, the Due Process Clause protects Respondent and prisoners similarly situated from arbitrary punishment for alleged misconduct. A central tenet of due process is that persons "may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

a. The imposition of substantial punishment upon prisoners is not "within the normal limits or range of custody which the conviction has authorized the State to impose." *Meachum v. Fano*, 427 U.S. 215, 225 (1976). The

state may legitimately take action for administrative or regulatory reasons without triggering the Due Process Clause, but may be required to afford fair procedures when similar measures are taken because of punishment for misconduct.

b. State prison disciplinary systems have uniformly recognized that substantial punishment must be accompanied by fair procedures. One reason for this is that punishment for misconduct inescapably has consequences beyond the time a prisoner spends in solitary confinement. This Court has recognized the stigma attached to disciplinary segregation in its earlier cases regarding segregation decisions by prison officials. *Hewitt, supra*, 459 U.S. at 473.

c. The safeguards provided by *Wolff* guarantee much more than abstract notions of fairness. Those safeguards play a major role in maintaining peace and security for both inmates and staff. Furthermore, society has a great stake in rehabilitation, promoting that policy of "restoring [the offender] to normal and useful life within the law." *Morrissey v. Brewer*, 408 U.S. 471, 484 (1971).

ARGUMENT

I. HAWAII PRISON REGULATIONS GOVERNING DISCIPLINE ARE WRITTEN IN MANDATORY LANGUAGE LIMITING THE DISCRETION OF PRISON OFFICIALS AND THUS CREATE A "LIBERTY INTEREST" IN REMAINING FREE FROM DISCIPLINARY SEGREGATION ABSENT A FINDING OR ADMISSION OF MISCONDUCT.

A. Hawaii's Regulations Create a Right to be Free from Disciplinary Segregation or Other Punishment in the Absence of a Finding or Admission of "Serious Misconduct."

1. The Hawaii Regulations Contain "Substantive Predicates" Limiting Official Discretion Before Punishment for Misconduct May Be Imposed.

This Court long has held that liberty interests under the Due Process Clause are created by the Constitution and by statutes. The Court has explained that "a person's liberty is equally protected even when the liberty is a statutory creation of the state," *Wolff, supra*, 418 U.S. at 558, since statutory entitlements include "many of the core values of unqualified liberty." *Morrissey, supra*, 408 U.S. at 482. In many cases and in many contexts, the Court has relied on state law as the basis for finding liberty interests. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975) (state law creates a liberty interest in students not being suspended from school without due process).

This Court's decision in *Wolff, supra*, 418 U.S. 539, found that state prison regulations governing the imposition of discipline created a "liberty interest" protected by the guarantees of procedural fairness in the Due Process

Clause. This Court also acknowledged in *Wolff* that prisoners had a "liberty interest" in avoiding solitary confinement. *Id.*, at 571, n.19.

In *Wright v. Enomoto*, 434 U.S. 1052 (1978), this Court summarily affirmed a decision requiring due process before inmates could be placed in "maximum security" units at several California prisons. *Wright v. Enomoto*, 462 F.Supp. 397 (N.D. Cal. 1976).⁹ Similarly, in *Hughes v. Rowe*, 449 U.S. 5, 11 (1980), this Court observed that "[s]egregation of a prisoner without a prior hearing may violate due process."

In *Hewitt, supra*, 459 U.S. 460, this Court expressly held that prisoners have a liberty interest in remaining free from administrative segregation if "the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a liberty interest." 459 U.S. at 472.

States may create liberty interests in a variety of ways. *Id.* The dispositive point here is whether the state

⁹ Petitioner seeks to distinguish *Wright v. Enomoto* because of the particular conditions in the "maximum security" units at issue in that case, or the "strong inference" of racial discrimination, or the "apparent total irrationality" of the placement system in the case. [Pet. Br. 30-31 n.17]. However, the *Wright* court did not base its holding on an independent constitutional violation or on the issue of whether placement in "maximum security" extended an inmate's length of sentence. To the extent *Wright* was based on the conditions in California's maximum security units, the conditions at HCF should be considered by the district court on remand. The record before this Court about these conditions is incomplete.

has placed substantive limits on the discretion of prison authorities to impose disciplinary segregation as a punishment for misconduct.¹⁰ As this Court recognized in *Thompson*, the most common manner in which a state creates a liberty interest is by establishing "substantive predicates" that govern and restrict official decision-making and "by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *Thompson*, *supra*, 490 U.S. at 462.

Therefore, under established due process jurisprudence the courts below were required to "examine closely the language of the relevant statutes and regulations" to determine if Hawaii had placed "substantive limitations on official discretion" in its prison regulations to create a liberty interest in remaining free from disciplinary segregation absent a finding of substantial evidence of serious misconduct. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454 (1989).

¹⁰ This Court has found "liberty interests" in state laws governing various aspects of prison administration. For example, in *Greenholtz v. Inmates of Nebraska Penal Cor. Complex*, 442 U.S. 1, 12 (1979), this Court ruled that although the mere existence of a parole system fails to establish a liberty interest for those seeking parole, the particular statute at issue contained mandatory language and thus entitled the inmate to protection. See also *Board of Pardons v. Allen*, 482 U.S. 369 (1987) (Montana parole law required that parole be granted if inmate can be released without detriment to community and therefore creates a liberty interest); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (prisoners have a liberty interest in avoiding the unwanted administration of antipsychotic drugs); *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (prisoners have a liberty interest in not being transferred from a prison to a mental institution).

The regulations at issue in this case raise no novel issue under this Court's cases. Indeed, prison discipline regulations will rarely, if ever, give prison officials the unlimited authority to punish a prisoner without a finding of misconduct by the prisoner.¹¹ Such required findings are a paradigm of "substantive predicates" with a mandatory relationship to the outcome of decision-making. The Hawaii rules constitute "a definite, unqualified, nondiscretionary standard for determining when [the state's] prison officials may as a disciplinary measure take away a prisoner's right to the relatively greater liberty of ordinary confinement, compared to the approximation to solitary confinement that is segregation. . . ." *Gilbert v. Frazier*, 931 F.2d 1581, 1582 (7th Cir. 1991); accord, *Green v. Ferrell*, 801 F.2d 765, 768-69 (5th Cir. 1986); *Sher v. Coughlin*, 739 F.2d 77, 81 (2d Cir. 1984).

As Judge Fong found in *Mujahid v. Apao*, 795 F.Supp. 1020, 1024 (D.Haw. 1992), "[t]here is no question that Hawaii's administrative regulations governing the conduct of a disciplinary hearing are mandatory." More important, Judge Fong found that "[w]ithout question, the Adjustment Committee could not have imposed the sanction or punishment of disciplinary segregation absent a factual finding of misconduct." *Id.* at 1025. "An Adjustment Committee does not have the discretion to impose sanctions wantonly; instead its actions must be

¹¹ As the Second Circuit observed in *Sher v. Coughlin*, 739 F.2d 77, 80 (2d Cir. 1984), "[t]he state statutes and regulations authorizing restrictive confinement as a punishment upon a finding of a disciplinary infraction will invariably provide sufficient limitation on the discretion of prison officials to create a liberty interest."

predicated on substantive charges." *Id.* "Punishment is predicated upon guilt." *Id.*

The particulars of Hawaii's disciplinary scheme illustrate its mandatory character. The regulations list specific categories of misconduct from the most to least serious and set forth maximum penalties for each category.¹² § 17-201-6 to § 17-201-11. The "adjustment process" established therein is concerned with tailoring "punishment" to "specific rule violations." § 17-201-4.

"Serious misconduct," as defined in § 17-201-12, "shall" be punished through an Adjustment Committee. The regulations mandate a series of steps before punishment can be imposed. After these steps are followed and there is a hearing before the Adjustment Committee, the

¹² Petitioner contends that it is significant that punishment is optional even for proven misconduct. Section 17-201-12 states that serious misconduct "shall" be punished and so it is not clear that Petitioner's premise is correct. However, even if there is an option not to punish, as discussed in § IA2, *infra*, whether administrators were *required* to impose punishment upon a finding of guilt is not the issue. The important fact is that punishment may not be imposed *in the absence* of a finding or admission of guilt.

The regulations at issue in *Wolff*, like Hawaii's regulations, provided for a variety of sanctions and authorized, but did not *mandate*, a loss of good time. *Wolff*, *supra*, 418 U.S. at 552. The Nebraska regulations stated that "[d]isciplinary action taken and recommended may include but not necessarily be limited to the following: reprimand, restrictions of various kinds, extra duty, confinement in the Adjustment Center, withholding of statutory good time and/or extra earned good time, or a combination of the elements listed herein." *Id.* Thus, this Court found a liberty interest in this scheme even though there was a very wide range of punishment.

Committee "shall" make a finding of guilt where either (1) the inmate or ward admits the violation or pleads guilty; or (2) the charge is supported by substantial evidence. § 17-201-18(b).

This disciplinary system gives every inmate in the Hawaii State Prison system a legitimate expectation that they will not suffer punishment for "serious misconduct" in the absence of an admission of guilt or a finding of guilt based on "substantial evidence."¹³ There could be no clearer substantive limitation on the discretion of prison officials than this.

2. Prison Administrators May Impose Discipline Only After a Finding or Admission of Misconduct.

Petitioner contends that Hawaii's elaborate set of procedures and substantive limits on the imposition of punishment for misconduct are subject to a discretionary override by the warden or "facility administrator" in § 17-201-20(b) that is governed by no limitations on discretion at all. [Pet. Br. 11-12]. § 17-201-20(b) does give the warden the authority to initiate review of any Adjustment Committee decision and to "modify any committee

¹³ Petitioner argues that the "substantial evidence" requirement is a mere procedural burden of proof and thus cannot be found by itself to create a "liberty interest." [Pet. Br. 43-45]. However, even if this characterization of the "substantive evidence" standard is accepted, there is no question but that the "substantive predicate" of a finding of misconduct must occur before punishment can be imposed, regardless of the evidentiary burden applied. *See* § IA4, *infra*.

findings or decisions." Petitioner's suggestion, though, that the warden may impose disciplinary segregation or other punishments without regard to the substantive and procedural limitations in sub-chapter 2 is a bizarre reading of § 17-201-20(b). Petitioner's contention would make the adjustment process an elaborate sham.

The entire structure of Subchapter 2 of the disciplinary regulations relating to "The Adjustment Process" is based on § 17-201-4's general mandate that the process "tailors punishment for specific rules violations." The residual authority vested in the warden to review and modify adjustment committee findings and decisions must be understood in the context of the entire regulatory scheme as a further tool to "tailor" punishment and not as an independent, standardless override power enabling the warden to impose punishment without a finding of guilt.

While § 17-201-20(b) gives the warden certain procedural rights (e.g., to order the Adjustment Committee to rehear the matter) and the right to "modify"¹⁴ committee

¹⁴ Indeed, the use of the word "modify" in the regulation is itself a substantial limit on the warden's discretion and undermines Petitioner's claim that the regulation gives the warden unfettered ability to overturn committee findings. As this Court declared just last Term: "The word 'modify' – like a number of other English words employing the root 'mod-' (deriving from the Latin word for 'measure'), such as 'moderate,' 'modulate,' 'modest,' and 'modicum,' – has a connotation of increment or limitation. Virtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion." *MCI Telecommunications v. American Tel. & Tel.*, ___ U.S. ___, 114 S.Ct. 2223, 2229 (1994). In other words, under Hawaii law, the

findings or decisions, there is no basis in the regulations, Hawaii law or common sense or in the leading federal court decision construing the regulations, *Mujahid v. Apao*, 795 F.Supp. at 1024-25, for Petitioner's argument that the warden may impose punishment without an admission of guilt or substantial evidence of guilt of specified misconduct. Nor is there anything in the record of this case indicating that § 17-201-20(b) provides such unfettered discretion to the warden under Hawaii law or that the warden has in fact punished inmates without a finding or admission of misconduct.

3. The Thompson Decision Does Not Condition the Creation of a "Liberty Interest" Upon Regulations that Mandate Punishment.

Petitioner contends that this Court's decision in *Thompson* creates a "two way mandatory outcomes" test for determining when a "liberty interest" is created by prison regulations. That is, she contends that to create a liberty interest, a regulation must specify the outcome both when the substantive predicate is present and when it is absent, eliminating all discretion either to impose a sanction or to refrain from imposing it.

Petitioner misinterprets the result in *Thompson*. The result in *Thompson* was based on the fact that visitors

warden only can make minor changes, modifications, in punishment. There is no limitless discretion to ignore what the Adjustment Committee has done or to impose punishment in the absence of substantial evidence of guilt as Petitioner argues.

could be excluded at will under the policies; thus, there were no "substantive predicates" in Kentucky's visiting regulations, *i.e.*, regulations did not place any limits on decisions to deny visits. *Thompson, supra*, 490 U.S. at 464-465. Thus, at bottom *Thompson* is a case like *Meachum v. Fano, supra*, 427 U.S. 215, or *Olim v. Wakinekona*, 461 U.S. 238 (1983), where no substantive limitations on discretion existed in state law.

Thompson itself distinguished the visiting regulations at issue in that case from the administrative segregation rules creating a "liberty interest" in *Hewitt*. In *Hewitt*, the regulations stated that administrative segregation "may" – not "shall" – be imposed based on "the need for control" or other substantive predicates. The Supreme Court noted that this really means that "administrative segregation will not occur absent specific substantive predicates," 459 U.S. at 471-72, and found a liberty interest even though the regulation permitted officials to refrain from imposing segregation even when the substantive predicates were present. Thus, this Court did not require the existence of a "two-way mandatory" outcome to be present before a "liberty interest" was protected.

The Court in *Thompson* concluded:

The overall effect of the regulations is not such that an inmate can reasonably form an objective expectation that a visit would necessarily be allowed absent the occurrence of one of the listed conditions. Or, to state it differently, the regulations are not worded in such a way that an inmate could reasonably expect to enforce them against the prison officials.

490 U.S. at 464-65. Thus, this Court's central concern in *Thompson*, as in *Hewitt*, was the question whether the individual had an expectation of enforcement against the government, not whether the government had committed itself to enforcement without exception against the individual.¹⁵

The "liberty interest" created by the administrative segregation regulations at issue in *Hewitt* did not require prison administrators to segregate prisoners if the substantive predicates were met, nor did the disciplinary regulations at issue in *Wolff* require the loss of good time if a finding of misconduct was made.¹⁶ The key point in

¹⁵ See, *Smith v. Shettle*, 946 F.2d 1250, 1253 (7th Cir. 1991) (Posner, J.) (dicta that "prosecutorial discretion" does not negate a liberty interest); *Mendoza v. Blodgett*, 960 F.2d 1425 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1005 and 113 S.Ct. 1027 (1993) (question whether there was discretion *not* to impose a restriction was beside the point of liberty interest analysis).

¹⁶ The Third Circuit reached a similar conclusion in *Layton v. Beyer*, 953 F.2d 839 (3d Cir. 1992), in finding a liberty interest in regulations governing placement in the Management Control Units of the New Jersey prison system. The defendants in *Layton*, as Petitioner does here, argued that under *Thompson* the existence of discretion not to impose a liberty deprivation if the substantive predicates are found precludes a finding of a liberty interest.

In rejecting this argument, the *Layton* court found that the key to the *Thompson* holding is that the Kentucky regulations permitted exclusion of visitors based on the listed reasons "but not limited to" them." 953 F.2d at 848. That is, if a statute or regulation lists "substantive predicates," but does not make them the exclusive basis for the liberty deprivation at issue, it does not limit officials' discretion sufficiently to create a liberty interest.

Wolff and *Hewitt* was that prison administrators were limited in their discretion to impose disciplinary segregation (*Wolff*) or administrative segregation (*Hewitt*) by the requirements imposed by state law. Unless these "substantive predicates" were met officials could not act against the prisoner. In contrast, in *Thompson*, official discretion was unlimited. If Kentucky regulations had provided that visits "shall not be denied unless" there was a finding of specified misconduct, *Wolff* and *Hewitt* would have required recognition of a liberty interest.

4. The Limitations on Officer Discretion at Issue Herein Are Substantive Limitations.

Petitioner argues that Hawaii's regulations offer merely an expectation of receiving process and that is not a liberty interest protected by the Due Process Clause. [Pet. Br. 43-45]. However, Hawaii law provides that disciplinary segregation "shall" occur only when *particular offenses* are proven by "substantial evidence." Thus, the primary limitations in the Hawaii regulations on administrative discretion to punish are substantive. The regulations provide assurance that prisoners have a right to

The Third Circuit went on to find that *Thompson's* requirement that the statute or regulation must "mandat[e] the outcome to be reached" if the substantive predicates exist means only "that the statutes must force the decisionmaker to use the listed criteria as the only reasons for depriving the prisoner of the liberty interest in question." 953 F.2d at 849. The Third Circuit's reading of *Thompson* is fully consistent with this Court's decisions in *Hewitt* and *Vitek*. Petitioner's argument would require the conclusion that this Court overruled *Hewitt* and *Vitek* in *Thompson* without saying so.

remain free from disciplinary segregation until and unless the State can prove, with substantial evidence, that they have committed specified offenses. See § IA1, *supra*. The substantive limitations exist in Hawaii's discipline regulations regardless of the evidentiary standard under which guilt must be demonstrated.

Moreover, Hawaii law precludes disciplinary punishment unless the state meets its burden of proving certain offenses by substantial evidence. Respondent does not claim a liberty interest based solely on the "substantial evidence" test, as Petitioner suggests [Pet. Br. 43-45]. The fact that Hawaii requires "substantial evidence" of specific misconduct before disciplinary segregation, or other punishment, may be imposed creates the liberty interest claimed by Respondent and found by the Ninth Circuit.

B. The Fact That Respondent Might Have Been Confined to the Special Holding Unit For Classification or Other Non-Punitive Reasons Does Not Undermine Respondent's Liberty Interest in Avoiding Disciplinary Segregation As a Punishment for Misconduct.

Petitioner argues that Respondent is not entitled to due process in disciplinary proceedings, despite the mandatory requirements of Hawaii law, because prisoners may be held in HCF's Special Housing Unit in conditions similar to disciplinary segregation for reasons other than punishment. [Pet. Br. 45]. This case does not concern the authority of prison administrators to make classification or housing decisions. Whether the regulations governing

the exercise of discretion in these areas create liberty interests requires a separate analysis.¹⁷

Wolff and *Hewitt*, taken together, treat these two segregation determinations differently. If Hawaii wishes to allow complete discretion in classification and housing decisions, Hawaii may do so, regardless of the different requirements of disciplinary proceedings.¹⁸

¹⁷ Hawaii classification regulations appear to create liberty interests. *Schroeder v. McDonald*, 823 F.Supp. 750, 762-64 (D.Haw. 1992); *aff'd in relevant part*, ___ F.3d ___, 1994 WL 663407 (9th Cir. 1994). Hawaii's administrative segregation placement regulations were initially held to implicate a liberty interest, but this decision was overturned in *Allen v. City and County of Honolulu*, 816 F.Supp. 1501, 1508-09 (D.Haw. 1993), *overruling Hatori v. Haga*, 751 F.Supp. 1401 (D.Haw. 1989).

This Court has previously found that Hawaii prison regulations do not limit the discretion of prison officials to transfer a prisoner to a prison on the mainland. *Olim, supra*, 461 U.S. 238. The result in *Olim* followed a line of cases starting with *Meachum, supra*, 427 U.S. 215, and *Montanye, supra*, 427 U.S. 236, in which such transfer decisions were found not to implicate liberty interests when state statutes or regulations granted unfettered discretion to prison officials over such decisions. This is in contrast to *Vitek, supra*, 445 U.S. 480, where the transfer to a mental institution was found to be subject to due process protections.

¹⁸ This Court has acknowledged the differences between disciplinary and administrative segregation in *Hewitt*, observing that "[u]nlike disciplinary confinement the stigma of wrongdoing or misconduct does not attach to administrative segregation under Pennsylvania's prison regulations." 459 U.S. at 473. This Court has frequently emphasized the difference between confinement for a regulatory purpose and confinement as a punishment even when those two confinements are in the same location. *See also, e.g., Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *United States v. Salerno*, 481 U.S. 739, 746 (1987).

The fact that Hawaii may allow prison officials to make classification decisions in their discretion does not vitiate the liberty interest created by the Hawaii regulations that Respondent not be punished by disciplinary segregation absent a finding or admission of misconduct.¹⁹ Such classification decisions would not have the collateral impact on parole decisions that a finding of "serious misconduct" may have. Hawaii law does not provide for any consideration of a prisoner's administrative segregation record in connection with parole decisions.

Another problem with Petitioner's argument is that it would require courts to examine and compare the conditions in administrative segregation and those in disciplinary segregation before deciding if the Due Process Clause applied in any given case. This new approach not only lacks a coherent rationale; it would be unworkable in

¹⁹ Petitioner places great reliance on the Seventh Circuit's decision in *Wallace v. Robinson*, 940 F.2d 243 (7th Cir. 1991) (en banc) for her argument that the discretion to put an inmate in administrative segregation undermines Respondent's liberty interest in avoiding disciplinary segregation. As the dissenting opinions in *Wallace* point out, the Seventh Circuit's due process analysis is unsupported by this Court's cases or any other Circuit court cases. *Id.*, at 249. More important, the *Wallace* case did not involve the prison disciplinary system. Rather, the inmate alleged that his transfer from a job assignment, a decision admittedly not subject to substantive limitations on administrative discretion, was really motivated by disciplinary concerns rather than the stated reason that he did not get along with his supervisor. In this case, there is no question about whether Petitioner was acting under Hawaii's discipline regulations and thus *Wallace* is inapplicable. Similarly, *Wallace* involved no government action that might have consequences for parole.

practice and would lead to increased litigation and uncertainty.

Petitioner's attempt to trivialize Respondent's suit by the suggestion that a finding of misconduct merely "marred [Respondent's] record" and was thus no more meaningful than an alleged libel must be rejected in light of the effect a finding of misconduct has in terms of punishment, classification and parole under Hawaii law. [Pet. Br. 47]. The potential punishment, which is more germane for due process analysis, is 30 days in segregation and a finding of misconduct that may be considered by Hawaii parole authorities in deciding when Respondent will be released from prison.²⁰ In this case the record indicates that Respondent's ability to work was interrupted by his punishment for misconduct. Thus, punishment for misconduct may have enormous collateral consequences in addition to a temporary change in housing and privileges. A prisoner's interest in avoiding 30 days in disciplinary segregation, especially with all of the collateral consequences of a finding of misconduct, is clearly an interest with "real substance." *Wolff, supra*, 418 U.S. at 557. See § II, *infra*.

²⁰ The fact that Respondent's "high misconduct" has been expunged does not moot his claim for damages.

C. A Prisoner Need Not Lose Good Time Credits or Have His Parole Date Affected Before He Possesses A Liberty Interest in Avoiding Arbitrary Punishment in Prison.

Petitioner argues, without support in this Court's cases, that a prisoner must lose good time credits, or otherwise have his sentence affected, before a "liberty interest" deriving from state law should be recognized by this Court. [Pet. Br. 24-37].

However, this Court has not determined "liberty interests" by a subjective evaluation of the importance of the interest involved but rather has insisted that "liberty interests" are created by reference to state law. "[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." *Board of Regents v. Roth*, 408 U.S. 564, 570-571 (1972). The existence of a "liberty interest" under this Court's cases depends on whether a person has "a legitimate claim of entitlement to it." *Id.*, at 577.

In *Hewitt*, this Court found that a "liberty interest" existed without a showing that administrative segregation would result in a loss of good time credits, a loss of parole or any other extrinsic adverse consequence. The only consequence of the decision at issue in *Hewitt* was the removal of a prisoner from the general population pending resolution of disciplinary charges. A unanimous Court held that the regulations created a "liberty interest."²¹ Thus, only by

²¹ *Wolff v. McDonnell* itself did not limit its holding to disciplinary procedures that inevitably resulted in the loss of good

overruling *Hewitt* can Petitioner's arguments be accepted.²²

D. Because Parole in Hawaii May Be Denied As Well As Rescinded After It Has Been Granted Based upon an Inmate's Misconduct Record, The Holding and Rationale of *Wolff v. McDonnell* Apply to Hawaii's Disciplinary Regulations.

Even if this Court accepted Petitioner's revisionist understanding of *Wolff* and overturned *Hewitt*, the potential effect of a finding of misconduct on Respondent's parole brings this case squarely within the holding and rationale of *Wolff*. Without adequate due process protections governing disciplinary charges, prisoners would be subject to the denial of parole based on erroneous misconduct findings – a possibility at odds with the basic teaching of *Wolff* and its progeny.

time credit. If misconduct was found, the Nebraska regulations at issue in *Wolff* provided for a wide range of penalties from a reprimand to the loss of good time credit. See, note 12, *supra*. This Court held, in *Haines v. Kerner*, 404 U.S. 519, 520 (1972), that a claim involving disciplinary confinement alone stated a due process claim under 42 U.S.C. § 1983. See also *Cox v. Cook*, 420 U.S. 734 (1975).

²² This position would also require the overruling of *Vitek v. Jones* and *Washington v. Harper*, in which this Court found that prisoners have liberty interests in avoiding transfer to mental institutions and in being free from involuntary administration of anti-psychotic medications. Petitioner's request for a bright line rule would entail overruling a quarter of a century of this Court's decisions, relied upon by states throughout the country; that state laws do create liberty interests for prisoners.

Hawaii has established a system of parole. Parole may be granted in Hawaii "at any time after a prisoner has served the minimum term of imprisonment fixed according to law." Haw. Rev. Stat. §§ 353-68, 353-69 (1985). [Pet. Br., 10; Pet. Br. App., 36a-37a]. Though Hawaii has no system of good time credits, an inmate's misconduct record is an important criteria in the parole decision. Parole may be denied to an inmate when the Hawaii State Paroling Authority ("Authority") finds, among other things, that the "inmate has been a management or security problem in prison as evidenced by the inmate's misconduct record." Haw. Admin. R. 23-700-33(b). [Pet. Br. App. at 43a-44a]. Furthermore, even if parole is granted, "it may be rescinded prior to the release of the inmate on parole when the Authority receives new information on the inmate that would be the basis to deny the parole." Haw. Admin. R. 23-700-31(c). [Pet. Br. App. 42a].

The inmate's misconduct record plays a role in the Hawaiian regulatory scheme identical to the "good time" credit system used by the State of Nebraska in *Wolff*, *i.e.*, misconduct may cause a deprivation of physical freedom. In *Wolff*, a finding of misconduct could lead to consequences that "may include but not necessarily be limited to the following: . . . withholding of statutory good time and/or extra earned good time, or a combination of the elements listed herein." *Id.*, at 552. Thus, although the existence of "good time" was created by statute, the decision to take away such credits upon a predicate finding of misconduct was entirely discretionary.

Hawaii has thus created a system of parole where the availability of early release or the revocation of release

already granted is impacted by a finding of misconduct. This is identical to the "if/then" syllogism in *Wolff*. Since prisoners in Hawaii can be denied parole if they are guilty of any misconduct, the "determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed." *Wolff*, *supra*, 418 U.S. at 558.

Petitioner carefully skirts this issue in her statement of the "Question Presented." Petitioner expresses the question before the Court as being whether an inmate "who is not subject to a loss of good time credit nor to any *necessary* impact on parole . . . " has a "liberty interest" involved. [Pet. Br., i [emphasis added]]. In *Wolff*, the chief executive officer of any penal facility was empowered so that he "may order that a person's reduction of term as provided in [the Nebraska good time credit statute] be forfeited or withheld." 418 U.S. at 545 n.5 (emphasis supplied). A serious misconduct finding did not *necessarily* have an impact on early release. Likewise here, parole may not *necessarily* be impacted, but the parole authority may base its decision to deny parole on a finding of misconduct. This potential consequence, like the *possible* loss of good time credit in *Wolff*, is serious enough to require due process safeguards even under the arguments advanced by Petitioner and her *amici*.

E. The State Is Not Significantly Burdened and Federalism Is Not Offended By Judicial Recognition that Hawaii Law Creates a Liberty Interest that Prisoners Not be Subjected to Disciplinary Segregation Without Due Process.

Petitioner describes the Ninth Circuit's decision as a "far-reaching ruling" that "expands federal control over

state prison management in a manner which this Court has never approved." [Pet. Br. 24]. This hyperbole is unjustified. The Ninth Circuit's ruling was limited and concluded only that Hawaii law created a liberty interest in avoiding disciplinary punishment in the absence of substantial evidence of or an admission of specific misconduct. As demonstrated in § IA, *supra*, this ruling was fully in accord with two decades of decisions from this Court holding that state laws can create liberty interests for prisoners. The decision did not, as Petitioner claims, require "exacting federal review of prison disciplinary records." [Pet. Br. 25]. All the Ninth Circuit did was recognize that the minimum due process requirements of *Wolff* applied to Hawaii's scheme for disciplinary punishment in its prisons.

Although Petitioner repeatedly invokes federalism and the undesirability of federal judicial control of prisons, Petitioner ignores the fact that the "liberty interest" here was created entirely by Hawaii law and may be modified by Hawaii. It is only then that this Court would be faced with the issue of whether the Due Process Clause itself constrains Hawaii officials from imposing punishment for misconduct in the absence of state regulations creating liberty interests.

In reality, it is the approach urged by Petitioner and her *amici* that would work a radical change in the law. If this Court accepts the argument that state laws do *not* create liberty interests, then the judiciary would bear the entire burden of determining the liberty interests protected by the Due Process Clause. In addition to requiring

the reversal of decades of settled law²³ and the expectations that have developed around this Court's decisions, courts would be required to embark on their own examination of what constitutes "liberty" for due process purposes. Surely this approach raises more federalism concerns than this Court's decisions grounding liberty interests in state law.²⁴

F. Fundamental Principles of Stare Decisis Stand in the Way of Petitioner's Radical Reworking of This Court's Due Process Jurisprudence.

In urging this Court to overrule a quarter of a century of precedents defining the meaning of liberty under the Due Process Clause, Petitioner and her *amici* ignore the importance of *stare decisis* and the expectations that have developed throughout the country based on this Court's decisions. As this Court has noted, "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for

²³ See, e.g., *Siebert v. Gilley*, ___ U.S. ___, 111 S.Ct. 1789 (1991); *Paul v. Davis*, 424 U.S. 693 (1974); *Perry v. Sinderman*, 408 U.S. 593 (1972).

²⁴ A leading commentator explained that "[t]he positivist definition of property and liberty also promotes the Court's interest in judicial restraint by making due process dependent on extrajudicial sources. It promotes federalism by directing the federal judiciary to turn to state law to determine whether protectible interests exist. Including liberty interests in this positivist model compels federal judges to defer to state prison administrators and subjects individual freedom to state control." Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. Rev. 482, 526 (1984).

precedent is, by definition, indispensable." *Planned Parenthood v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 2808 (1992).²⁵

²⁵ So imbedded in our law are the due process guarantees of *Wolff v. McDonnell* that the United States government has relied upon the protections of *Wolff* in assuring the international community that our Constitution protects prisoners from cruel, inhuman and degrading treatment or punishment in its first compliance report to the United Nations Human Rights Committee under the recently ratified International Covenant on Civil and Political Rights. As the report underscored:

All correctional systems in the U.S. have codes of conduct that govern behavior, and all have systems for imposing sanctions when inmates violate this code. These disciplinary systems are essential to ensuring the security and good order of correctional institutions. Inmates are provided a copy of the code of conduct immediately upon their arrival at a correctional institution, and additional copies are maintained in the inmate law libraries. The prison disciplinary process is administered internally, but there are important constitutional requirements that provide guidance.

Segregation is one of the sanctions that may be imposed upon an inmate who it has been determined, has violated the code of conduct. Before this sanction may be imposed, the inmate is entitled to due process protections emanating from the Fifth and Fourteenth Amendments of the Constitution and recognized by the Supreme Court in *Wolff v. McDonnell*, 418 U.S. 539 (1974).

Initial Report of the United States of America to the U.N. Human Rights Committee Under the International Covenant on Civil and Political Rights, United States Department of State (July 1994), at 68. The United States will defend its initial report before the United Nations Human Rights Committee in March 1995.

Stare decisis, of course, is not absolute. But this Court has recognized only relatively limited circumstances which justify the overruling of precedents. Precedents are overruled if a "rule has proved to be intolerable simply in defying practical workability," or if the law has changed so much as "to have left the old rule no more than a remnant of abandoned doctrine," or if "facts have so changed or come to be seen so differently as to have robbed the old rule of significant application or justification." *Id.*, at 2808-2809.

None of these justifications for overruling precedent is present here. Every state has adopted statutes and regulations that provide for due process before the imposition of prison discipline; this has not proven unworkable in practice.²⁶ Neither the law nor facts have changed in a way that would justify the radical departure from precedent urged by Petitioner and her *amici* in asking this Court to abandon state law as a source of liberty interests or to conclude that prisoners, once incarcerated, have no liberty interests.

²⁶ Many federal court cases have found that the extent of inmate-inmate violence in particular prisons constitutes cruel and unusual punishment. However, counsel knows of no case attributing such a condition to the strictures of *Wolff* in the conduct of disciplinary hearings. Rather, they are generally attributed to overcrowding or to management deficiencies such as inadequate classification or staff supervision, or to failure to investigate and prosecute misconduct in the first instance. See, e.g., *LaMarca v. Turner*, 995 F.2d 1526, 1537-38 (11th Cir. 1993) cert. denied, 114 S.Ct. 1189 (1994); *Fisher v. Koehler*, 692 F.Supp. 1519 (S.D.N.Y. 1988), aff'd 902 F.2d 2 (2d Cir. 1990).

For the last quarter of a century, this Court has held that liberty and property interests are generated by laws that create expectations. The function of due process is to protect these expectations and to limit arbitrary government conduct which would deprive people of their liberty and property interests created outside the Constitution. This Court should reject the urging of Petitioner and her *amici* to overrule countless decisions which have followed this approach to the Due Process Clause.

II. THE DUE PROCESS CLAUSE, INDEPENDENT OF LIBERTY INTERESTS EMANATING FROM STATE LAW, REQUIRES THAT FAIR PROCEDURES BE EMPLOYED BEFORE IMPOSING PUNISHMENT LIKE THAT IMPOSED UPON RESPONDENT.

A. The Imposition of Substantial Punishment is a Liberty Deprivation Meriting Due Process Protections.

A central tenet of due process is that persons "may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). This principle has been applied in a variety of contexts. In *Bell*, it governed the inquiry into the constitutionality of conditions of pre-trial detention. In other cases it has been applied to matters as various as the deprivation of citizenship, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-67, 186 (1963); the suspension of Social Security benefits, *Flemming v. Nestor*, 363 U.S. 603 (1960); the corporal punishment of schoolchildren, *Ingraham v. Wright*, 430 U.S. 651, 674 (1977); and imprisonment at hard labor for immigration violations. *Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

To say that punishment may not be imposed without an adjudication of guilt acknowledges the self-evident fact that one of the greatest constraints of human freedom is the power of government to bring its coercive powers to bear upon citizens. Moreover, an action taken to punish a person for some real or imagined misconduct is more devastating in its impact than that same action taken in the service of the legitimate operation of government.²⁷

Convicted prisoners have been adjudicated guilty of crimes. However, a finding of guilt as to one specific crime does not give the state unlimited power exercised by prison officials to impose additional punishments for alleged misconduct in prison. Such an unlimited power to punish cannot rationally be comprehended within the proposition that "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution." *Meachum v. Fano*, *supra*, 427 U.S. at 224. Disciplinary punishment without constitutional check is not "within the normal limits or range of custody which the conviction has authorized the State to impose," (*Id.*, at 225), any more than commitment to a mental hospital or subjection to the unwanted administration of psychotropic drugs. See *Vitek*, *supra*, 445 U.S. at 488; *Washington*, *supra*, 494 U.S. at 221-22.

Given the complexities of modern life and government, the state may legitimately take actions for genuine

²⁷ As Justice Holmes once observed, "even a dog distinguishes between being stumbled over and being kicked." O. Holmes, *The Common Law* 3 (1981).

administrative or regulatory reasons that are similar or even identical to measures that are used as punishment in other contexts. Thus, persons awaiting trial may be incarcerated, *Bell*, 441 U.S. at 537, although incarceration is also the nation's primary form of punishment. Deprivation of citizenship requires due process when done for punitive reasons, but not when done as an exercise of Congress' power to regulate foreign affairs. *Kennedy v. Mendoza-Martinez*, *supra*, 372 U.S. at 162-67, distinguishing *Perez v. Brownell*, 356 U.S. 44 (1958). In the prison context, persons may be placed in administrative segregation, despite similarity to the conditions of punitive segregation, without running afoul of the Due Process Clause. *Hewitt*, *supra*, 459 U.S. at 468.

The "punishment" inquiry may present difficult line-drawing problems in some cases, as this Court has long acknowledged.²⁸ See *Montanye v. Haymes*, 427 U.S. 236

²⁸ This Court's cases acknowledge that determining what constitutes punishment is not always straightforward. It has stated as a test:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operations will promote the traditional aims of punishment - retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

(1976) (declining to distinguish between transfers imposed for administrative purposes and those that might circumstantially be shown to be punitive). However, no such problems present themselves here, since it is not disputed that Hawaii's system of sanctions for violations of disciplinary rules is a punitive system or that the treatment of the Respondent was punitive in nature.²⁹

B. The Court's Prior Decisions Acknowledge that Substantial Punishments Require Due Process Protections.

The Court's decisions support the proposition that due process protections must be observed when substantial punishments are meted out to prisoners in the prison disciplinary system. In *Wolff*, *supra*, 418 U.S. 539, the Court held that a prisoner has a liberty interest under the

Bell v. Wolfish, *supra*, 441 U.S. at 537-38, quoting *Kennedy v. Mendoza-Martinez*, *supra*, 372 U.S. at 168-69.

The practicalities of prison administration may impose a *de minimis* standard of punitive action such that minor punishments for minor misconduct may escape due process scrutiny or call for lesser procedural protections. See *Wolff*, *supra*, 418 U.S. at 571 n. 19 (dicta suggesting that "lesser penalties such as the loss of privileges" would not require *Wolff* procedures); *McCann v. Coughlin*, 698 F.2d 112, 121 (2d Cir. 1983) (setting threshold for due process inquiry at placement in "Special Housing Unit" or two weeks' confinement in prisoner's own cell). That question is not before the Court in this case.

²⁹ The lexicon of the Hawaii prison regulations focuses on "punishment" for prohibited acts within the various categories. §§ 17-201-6(b); 17-201-7(b); 17-201-8(b); 17-201-9(b); 17-201-10(b).

due process clause of the Fourteenth Amendment, independent of any liberty interest that may be created by state law, in not being arbitrarily punished with solitary confinement. The Court declared:

[I]t would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue.

Id., at 571 n. 19.

This Court did not concern itself with the source of this right not to be arbitrarily held in solitary confinement, but recognized that there was no principled distinction between punishment forfeiting good time and punishment imposing solitary confinement. This right was acknowledged to exist even though the Court did not locate its source within state law.

In *Cox v. Cook*, 420 U.S. 734, 736 (1975) (*per curiam*), this Court noted one year later that "[i]n *Wolff v. McDonnell*, . . . we held that a state prisoner was entitled *under the Due Process Clause of the Fourteenth Amendment* to notice and some kind of hearing in connection with discipline determinations involving serious misconduct." (Emphasis added.) In *Hughes v. Rowe*, 449 U.S. 5 (1980) this Court approved of a lower court's statement that the Fourteenth Amendment affords a prisoner minimum procedural safeguards before disciplinary action may be taken. (*Id.* at 9.) This Court has been steady in holding that, in addition to liberty interests created by state laws, the serious loss of freedom imposed by solitary confinement is *inherently* a deprivation of liberty.

The Court emphasized in *Wolff* that the "touchstone of due process is protection of the individual against arbitrary action of government." 418 U.S. at 558. Since *Wolff*, neither this Court nor any lower court has altered the composition of that touchstone by allowing arbitrary government action that results in the serious loss of freedom to a prisoner.

C. The Consequences of Prison Punishment Go Beyond the Sanction Imposed and Have a Pervasive Effect on Liberty.

In recognition that imposing punishment is a qualitatively different act from imposing restrictions based on administrative necessity, every state prison disciplinary system appears to require some finding of misconduct before discipline can be imposed.³⁰ Most states' classification and transfer systems, and many states' administrative segregation systems, build in sufficient discretion that they do not create liberty interests.³¹ By contrast, we know of *no* state that authorizes the imposition of substantial punishment at the discretion of prison officials, without requiring a finding that the prisoner committed a

³⁰ This is the characterization made by the United States in international human rights forums. See note 25, *supra*.

³¹ See, e.g., *Templeman v. Gunter*, 16 F.3d 367, 369 (10th Cir. 1994) (Colorado administrative segregation); *Newell v. Brown*, 981 F.2d 880, 883-84 (6th Cir. 1992) (Michigan security classification), *cert. denied*, 114 S.Ct. 127 (1993); *O'Bar v. Pinon*, 953 F.2d 74, 84-85 (4th Cir. 1991) (North Carolina "pending evaluation" segregation, temporary release, reclassification, and transfers).

specific act in violation of a specific rule – notwithstanding the tortured construction placed on the Hawaii rules by the present Petitioner.

This recognition by the states is consistent with the reality that punishment for misconduct in a prison setting inescapably has broad consequences beyond the days a prisoner may spend in a segregated unit. A prisoner's disciplinary record can and will affect his eligibility for a less restrictive classification, for more desirable (or for any) employment within the prison, for transfer to a more desirable prison, for admission to educational or other program opportunities,³² or for work-release, furloughs, and other forms of temporary release. While the deprivation of none of these matters individually rises to the level of constitutionally defined liberty, their pervasive and cumulative impact strongly supports the proposition that the factor common to all of them – the prisoner's disciplinary determinations – should be recognized as implicating liberty.

A fortiori, the impact of prison discipline and punishment on the extent of imprisonment itself compels the

³² Inmates at HCF, including Respondent herein, are eligible to and do participate in the Correctional Industries Program. Hawaii Revised Statutes (1985 & Supp. 1992) § 354D-1, *et seq.* Under that program, the Department of Public Safety, "shall recommend a possible reduction in the minimum term to the Hawaii Paroling Authority for any offender satisfactorily participating in the Correctional Industries Program for a minimum of one year. . . ." § 354D-119b. A finding of serious misconduct disables the inmate from satisfactorily participating in the program and thereby obtaining the recommendation of a possible reduction in the minimum term.

recognition that imposing substantial punishment in prison should be recognized as a liberty deprivation. It is plain that a prisoner with an unfavorable disciplinary record has a substantially diminished chance of release on parole.³³ What is more, findings of misconduct can be used not just to deny parole but also to rescind parole that already has been granted. Haw. Admin. R. 23-700-31(c).

The Hawaii *Parole Handbook* expressly declares that the Parole Authority looks at the "number of misconducts." Specifically, the Hawaii *Parole Handbook* states that "[t]he Authority will look at: (1) the seriousness of the misconduct; (2) the number of frequencies of misconduct; (3) whether the misconduct indicates that the offender displays the patterns of behavior which brought him/her to prison; and (4) whether the misconduct record indicates that the offender cannot follow the terms and conditions of parole." *Parole Handbook*, at 7.

The initial finding of serious misconduct in this case and the imposition of disciplinary segregation potentially had a significant effect on Respondent's release date. In *Hewitt*, this Court recognized that the protections offered an inmate depend to a certain extent upon whether or not

³³ The fact that an expectation of parole may not constitute a liberty interest does not vitiate this point. When parole is possible and one of the criteria that paroling authorities use is an inmate's conduct record, parole decisions "involve a wholly retrospective factual questions" (*Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 9-10 (1979)) that demand a structure "to minimize the risk of erroneous decisions." *Id.* at 13; see also *Morrissey*, *supra*, 408 U.S. at 484.

it will have a significant effect on parole. *Hewitt*, *supra*, 459 U.S. at 473, ("[t]here is no indication that administrative segregation will have any significant effect in parole opportunities.") The influence of the inmate's disciplinary record on parole opportunities in Hawaii is indisputable.

D. Important Policy Considerations Support the View that Substantial Prison Punishments Cannot be Imposed Without Due Process.

There was a day when prisons could and did operate entirely arbitrarily, with no authority except the personal authority of the prison staff, and no recourse from their actions and decisions. That day is past. The exercise of arbitrary authority to punish, in prison or out of it, is alien to the basic norms of American society.

The safeguards of *Wolff* do more than guarantee a minimal integrity of fact-finding in prison discipline. They play a major role in maintaining the peace in prison, and therefore maintaining the safety of both inmates and staff. Twenty years after *Wolff*, minimal fairness in prison disciplinary proceedings has become part of the settled expectations of prison life.³⁴

³⁴ One cannot expect that the self-interest of prison officials and staff is sufficient to guarantee fairness in discipline, without reference to constitutional requirements and their enforcement. As this Court has acknowledged in denying absolute immunity to prison hearing officers, there are many pressures militating against fairness in prison. "It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance." *Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985).

Moreover, both society and the inmate have a stake in rehabilitation. Concededly, there is no constitutional right to rehabilitation; but it is beyond the nation's ability to keep all, or even most, wrongdoers locked up in perpetuity. For all but the worst offenders, the day will come when they return to the streets of lawful society. This Court recognized long ago that "[s]ociety has a stake in whatever may be the chance of restoring [the offender] to normal and useful life within the law. . . . And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Morrissey, supra*, 480 U.S. at 484 (dealing with parole revocation).

What is true for parolees is no less true for prisoners. Treating prisoners in a lawless fashion cannot promote their allegiance to the rule of law. The entire rehabilitative ethos, even in maximum security facilities like HCF, as well as the need for security and order in the facility, depend upon an environment that gives prisoners reasonable expectations that they will not be punished arbitrarily. To command obedience, the law itself must be credible and fair. For prisoners, once convicted and sentenced, their primary experience of the law is the prison disciplinary system. To hold that states can place this system wholly outside the bounds of the Due Process Clause, the Constitution's central guarantee of official lawfulness, would author a lesson for which all society ultimately may pay.

CONCLUSION

For all of these reasons the judgment of the Court of Appeals should be affirmed.

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In The
Supreme Court of the United States

October Term, 1994

CINDA SANDIN, *Unit Team Manager,*
Halawa Correctional Facility,

Petitioner,

vs.

DeMONT R.D. CONNER, *et al.,*

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. Respondent Conner and His *Amici* Prove that the Interest in Avoiding Disciplinary Segregation in Hawaii's Prisons Does Not Give Rise to a "Liberty Interest" and Attendant Federal Litigation over the "Process Due," Regardless of Any "Mandatory" Language in the Hawaii Prison Regulations.

In our Brief (Pet. Br. 24-37), we establish, as a matter of policy, principle, and precedent, the basis for the rule requested by more than thirty States in *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), and by thirty-seven states now: a "bright line" rule "that prison regulations, regardless of the mandatory character of their language, or the extent to which they limit official discretion, 'do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement.'" *Id.* at 461 n.3. Nothing that either Respondent or his *amici* present in opposition to this prayer, on which this Court has expressly reserved judgment, *id.* at 462 n.3, takes anything away from our arguments in support.

A. Granting Petitioner's Prayer Will Leave Ample Federal and State Legal Protection Against Arbitrary Segregation, While Refusing that Prayer Discourages Progressive Penological Reforms in An Arena Where Federal Interests, Due to the Lack of Any Necessary Impact of Segregation Decisions on the Duration of Confinement, are at Their Ebb.

Inmate Conner and his *amici* labor long to prove what no one disputes, namely, that "[d]isciplinary punishment without constitutional check is not 'within the normal limits or range of custody which [a] conviction

has authorized the State to impose' " on an incarcerated felon. Resp. Br. at 40 (quoting *Meachum v. Fano*, 427 U.S. 215, 224 (1976)). For no one, and certainly not Petitioner, asserts the federal Constitution is wholly inapplicable to decisions to transfer an inmate to the Special Holding Unit, whether under the auspices of Hawaii's "adjustment process," or otherwise. As we state, "even without procedural Due Process protections, inmates would be entitled under Equal Protection analysis to treatment that meets minimum rationality, and, a fortiori, would be protected from assignment to segregation status on the basis of race, sex, national origin, religion, or alienage." Pet. Br. at 26 (footnotes omitted). Inmates likewise would be protected from disciplinary segregation that exceeds Eighth Amendment standards, or that constitutes retaliation for exercise of an inmate's limited but important First Amendment rights of free speech, free exercise of religion, or reasonable access to the courts. *Id.* at 25-26. No challenges to "untrammelled power" (ACLU Br. at 51) or to treatment of prisoners "in a lawless fashion" (Resp. Br. at 48) are raised by this case, and, if this Court rules for Petitioner, inmates will retain a panoply of remedies under the federal Constitution, as well as state court remedies that exist if our prison rules are "mandatory" as the Ninth Circuit held.

Ironically, as Conner and his *amici* all but concede, the judgment below creates enormous incentives for States to abandon the "salutary" array of rules that "channel the decisionmaking of prison officials." *Hewitt v. Helms*, 459 U.S. 460, 471 (1983). Lengthy lawsuits over whether particular rules create "liberty interests," and, if so, whether the "process due" was given in particular instances, are the sort of "burdensome and unwarranted"

procedures that may cause States to "abandon or curtail" progressive penological approaches. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 13 (1979).

As Conner agrees, under the Ninth Circuit's reasoning, any federal Due Process rights here were "created entirely by Hawaii law and may be modified by Hawaii" (Resp. Br. at 35). And, except for a groundless argument that assignment to disciplinary segregation automatically constitutes deprivation of a "liberty interest" under the force of the Due Process Clause standing alone – a claim this Court has emphatically rejected for over twenty years¹ – Respondent has no rejoinder to our contention

¹ See *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) ("the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison"); *Meachum v. Fano*, 427 U.S. 215, 229 (1976) ("the Due Process Clause does not impose a nationwide rule mandating transfer hearings"); *Montanye v. Haymes*, 427 U.S. 236, 242 (1976) ("We therefore disagree with the Court of Appeals' general proposition that the Due Process Clause by its own force requires hearings whenever prison authorities transfer a prisoner to another institution because of his breach of prison rules, at least where the transfer may be said to involve substantially burdensome consequences."); see also *Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976); *Hewitt v. Helms*, 459 U.S. at 468; *Olim v. Wakinekona*, 461 U.S. at 248; *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 461. These cases effectively dispose of any arguments by Conner and his *amici* relying on doctrines applicable to pre-trial detention, and other deprivations visited upon persons not convicted of crime and not lawfully imprisoned under conditions that are "within the sentence imposed," *Montanye*, 427 U.S. at 242. See Resp. Br. at 39-48 (citing *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)). Also dispositive is that, under Hawaii law, disciplinary segregation is not punitive. "The disciplinary committee's objective is to maintain prison order and discipline," and not "to ascertain guilt or innocence, [or] to

that the decision of the Ninth Circuit below gives States good reasons to adopt mandatory assignments to segregated cells, *see* Pet. Br. 32, not only as the States seek to avoid procedural due process challenges to "individualized" segregation assignments, but as States try to carry out their duty to " 'take reasonable measures to guarantee the safety of the inmates.' " *See Farmer v. Brennan*, 114 S. Ct. 1970, 1976 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)).² Respondent's view thus not only frustrates the adjustment process's goal of "summarily maintaining prison order," *State v. Alvey*, 67 Haw. 49, 55, 678 P.2d 5, 9 (1984), but encourages a rigid "one man, one cell" rule, *cf. Bell v. Wolfish*, 441 U.S. 520, 542 (1979), that is antithetical to a flexible response to "the perplexing sociological problems of how best to achieve the goals of the penal function[.]" *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981). In an area where this Court has repeatedly granted prison officials "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security," *Bell*, 441

punish offenders[.]" *See State v. Alvey*, 67 Haw. 49, 56, 678 P.2d 5, 9 (1984).

² The suggestion by Conner's *amici* that disciplinary segregation inflicts "cruel and unusual punishment" (*see* ACLU Br. at 18 n.6 and Mandel Legal Aid Br. at 46) is baseless. Prison rules for the SHU provide for all necessary amenities, J.A. 156-68, Pet. Br. App. 23a, and inmates are not even in "solitary confinement" in that they may speak with their neighbors and may even "yell" across the Unit so long as they do not "disturb[] the sleep and routine of fellow inmates." J.A. 207. The courts below rejected all substantive challenges to conditions of confinement, as Conner concedes. Resp. Br. 3 n.1.

U.S. at 547, Conner's prayer for extensive post-hoc federal procedural review creates an intolerable constitutional straightjacket, subjecting prison managers to claims under the Eighth Amendment for refusals to pursue costly disciplinary actions, and claims under Due Process doctrine when they undertake such actions even in clear cases.³

Recognizing this, Respondent and his *amici* make much of the fact that a Hawaii inmate's disciplinary record may affect a prisoner's chances for parole, insofar as "[p]arole may be denied to an inmate when the [Hawaii Paroling] Authority finds" "[t]he inmate has been a management or security problem in prison as evidenced by the inmate's misconduct record," Haw. Admin. R. § 23-700-33(b), Pet. Br. App. 44a. *See* Resp. Br. 33-34, ACLU Br. at 17-18. Thus, as Respondent puts it, "like the possible loss of good time credit in *Wolff v. McDonnell*, 418 U.S. 539 (1974)," a disciplinary finding "is serious enough to require due process safeguards." Resp. Br. at 34.

Aside from the fact that these arguments were raised nowhere below, and should be ignored for that reason, *see Whitley v. Albers*, 475 U.S. at 326 (citing *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977)), these claims not only prove too much, but mischaracterize Hawaii's separate procedures for imposition of disciplinary segregation and the granting of parole. Respondent and his *amici* concede that assignment to disciplinary

³ Here, Conner confessed to cursing at a guard and failing to cooperate in a strip search, within ear shot of other SHU inmates, Pet. App. A61-A62, A66, an area where "the 'ever-present potential for violent confrontation and conflagration' " is at its height. *Whitley v. Albers*, 475 U.S. 312, 321 (1986).

segregation cannot, of its own force, alter an inmate's minimum term, or deprive the inmate of parole. *See* Resp. Br. at 32-34, ACLU Br. at 17-18. Thus, in this context, an assignment to segregation at worst carries with it a potential defamatory statement that may be considered at a parole hearing. Such statements do not, as a general matter, give rise to "violation of a constitutional right at all," *Siebert v. Gilley*, 500 U.S. 226, 232 (1991); *see id.* at 233 (discussing *Paul v. Davis*, 424 U.S. 693 (1976)), and if, as we urge, a mere transfer to disciplinary segregation is insufficient to create a "liberty interest," then, as this Court held in *Meachum v. Fano*, 427 U.S. 215, 229 n.8 (1976), the situation is not "substantially different because a record will be made of the transfer and the reasons which underlay it, thus perhaps affecting the future conditions of confinement, including the possibilities of parole." This is especially so in that the Supreme Court of Hawaii has authoritatively held that prison adjustment committee findings carry no collateral estoppel effect. *State v. Alvey*, 67 Haw. 49, 57, 678 P.2d 5, 10 (1984). Under comity principles, this Court "must give the agency's factfinding the same [non]preclusive effect," *Tennessee v. Elliott*, 478 U.S. 788, 799 (1986),⁴ and the

⁴ This non-preclusiveness is reinforced by the parole rules, which state only that a possible basis for denial of parole may lay in the conclusion of the Authority, after a hearing, that "[t]he inmate has been a management or security problem in prison as evidenced by the inmate's misconduct record." Haw. Admin. R. § 23-700-33(b) (emphasis added). The misconduct record, like the "written testimony" and "oral statements" of the prosecuting attorney and others who may appear at a parole hearing, is only "evidence," and can be rebutted at the time of the hearing, *id.* §§ 23-700-31(a), 23-700-35(c). *Amici's* claims to the contrary (Mandel Legal Aid Br. 48) are improper naked "denigrations of

teachings of *Paul*, *Meachum*, and *Siebert* are in force: the decision to assign an inmate to disciplinary segregation is no different than any other asserted defamatory "evidence" in the parole record.⁵

the procedural protections afforded by [state] law," *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987).

In addition, that the Paroling Authority rules also give power to deny parole if the inmate "has a pending prison misconduct" does not alter the analysis, for the very recency of the misconduct charge under this rule is significant irrespective of whether the inmate is innocent. Indeed, because no one suggests that there is a "liberty interest" in avoiding a mere misconduct charge, Respondent's logic fails on its own terms. Finally, the inmate, as noted *supra*, has the ability at his parole hearing to rebut the merits of any misconduct charge.

⁵ Respondent's argument, given the totally discretionary nature of parole in Hawaii, would, moreover, have the absurd effect of creating a "liberty interest" in pre-parole prison actions, where the parole decision itself is not constrained by procedural Due Process protections. *See* Pet. Br. at 10 (comparing Hawaii rules with *Board of Pardons v. Allen*, 482 U.S. 369, 374 (1987)). Aside from violating the logic of *Paul*, *Meachum*, and *Siebert*, affirmance on this basis would conflict with *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (no liberty interest in classification review committee hearing's recommended decision where "the prison Administrator's discretion is completely unfettered"). In any event, even if adverse adjustment committee findings did implicate a "liberty interest" in parole, that would not mean that they implicated a "liberty interest" in "freedom from disciplinary segregation." Pet. App. A3. It is only the latter "liberty interest" that formed the basis of the Ninth Circuit's decision, and, at worst, the potential impact of an adjustment committee finding on parole means only that federal Due Process requirements ought to apply at the time when the inmate receives his parole hearing. This analysis also applies to Respondent's argument, raised first here, that his assignment to disciplinary segregation in 1987 affected his ability to obtain a "recommend[ed] possible reduction in the

In short, this case turns on whether this Court meant what it said in *Hewitt v. Helms*, 459 U.S. at 470, when it recognized that "regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to 'liberty,' different from statutes and regulations in other areas." The "bright line" test outlined by the States in *Thompson*, and represented here, appropriately responds to this recognition, not only for the reasons above, but because any other rule necessarily implies that there is *no* "mandatory" prison regulation that can be written and executed immune from a costly and intrusive judge-made federal tax in the form of post-hoc procedural Due Process review. See Resp. Br. at 36 & n.24. As Petitioner has shown, disciplinary segregation at Halawa facility is nothing more than the aggregate of certain privileges and restrictions, which cannot be meaningfully distinguished for constitutional purposes from other sets of privileges and restrictions in other parts of the facility. See Pet. Br. at

minimum term" under Haw. Rev. Stat. § 354D-11(b) (Supp. 1992). See Resp. Br. 30, 45 n.32. This claim is also meritless in that § 345D-11(b) was not enacted until 1990, see Act of July 9, 1990, 1990 Haw. Sess. L. 1050, almost three years after Conner completed the confinement at issue, and, in any event, Respondent has pointed to no "specific facts" in the record that would even genuinely raise an issue of fact as to whether he would have been entitled to participate in a work program had he not been placed in disciplinary segregation, or whether any "possible reduction" would have been recommended or granted. See *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990). In addition, although inmates assigned to the SHU "do not attend programs they are scheduled for" "when [they] move to the Special Holding Unit," an inmate can be "rescheduled for his programs" as early as "the next week[.]" See J.A. 306, 307.

5-9, 28. Federalization of *all* state mandatory prison regulations under the guise of Respondent's Grand Unified Theory of Due Process⁶ is far beyond anything this Court's caselaw has contemplated, see, e.g., *Baxter v. Palmigiano*, 425 U.S. 308, 323 (1976), yet Respondent offers no principled manner for this Court, if it affirms the judgment below, to avoid that result. Resp. Br. at 42 n.28.

In the end, moreover, there is no reason to think that, if the Court reverses, States will repeal their "written rules regarding prison discipline and the penalties for infractions." *Hewitt*, 459 U.S. at 471. Petitioner concurs that imposing constraints on lower-level officials is wise practice, and that Hawaii's adjustment process, to the extent it contains "mandatory" requirements, implements a multi-tiered system of control that promotes "[t]he entire rehabilitative ethos[.]" Resp. Br. at 48. Such a system undeniably has a role "in maintaining the peace in prison," *id.* at 47, and for that reason will, if prison administrators are prudent in responding to the pressure of the Eighth Amendment, and, if this Court reverses, survive. In light of this fact, the judgment below simply frustrates "desirable experimentation" by the States, *Hewitt*, 459 U.S. at 471, and ignores "the delicate balance between state and federal courts," and should be overturned. *Albright v. Oliver*, 114 S. Ct. 807, 818-19 (1994) (Kennedy J., joined by Thomas, J., concurring).

⁶ See *Board of Education v. Grumet*, 114 S. Ct. 2481, 2495, 2498-99 (1994) (separate opinion of O'Connor, J.) ("It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular clause[.]" "[b]ut the same constitutional principle may operate very differently in different contexts.").

Respondent and his *amici* have no good answer to any of this, and accordingly the judgment below should be reversed.

B. Contrary to the Contentions of Respondent and His Amici, a Determination that Disciplinary Segregation Assignments Do Not Implicate a "Liberty Interest" Would Not Offend *Stare Decisis* Precepts; Indeed it Would Serve Them.

Castigating three-fourths of the States as counseling a "radical departure from precedent" (Resp. Br. at 38), that "would reverse" at least four plenary decisions of this Court (Mandel Legal Aid Br. at 33), "confuse prison administrators and prisoners, and in the process generate an explosion of litigation" (ACLU Br. at 51), Respondent and his *amici* invoke *stare decisis* as their ultimate defense of the judgment below.

The short answer here is that *Thompson* expressly left "for another day" "the proposal" of the States for a "bright line" rule that prison regulations "do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement." 490 U.S. at 461-62 n.3. That express deferral hardly makes sense if *stare decisis* bars the argument.

Petitioner submits that, if it were necessary to obtain reversal, this Court's precedents should be modified or revisited. The rule of law advocated by Respondent leads to nonsensical results, distorts the States' incentives, has no principled limits, and ultimately works against the real-world interests of inmates themselves. Under Conner's own view of *stare decisis*, the circumstances for

changing the law are present. See Resp. Br. at 37-38 (quoting *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808-09 (1992)). See also Mandel Legal Aid Br. at 41-42.

But as we have shown (Pet. Br. at 27-31), no such large steps are required to reverse even on the broader grounds we assert. As we and our *amici* point out, at most this is a "prime occasion for invoking [this Court's] customary refusal to be bound by dicta," and its "customary skepticism towards per curiam dispositions that lack the reasoned consideration of a full opinion[.]" *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 391 (1994). As the Court recognized in *Hewitt*, 459 U.S. at 469, "[e]xcept to the extent that our summary affirmance in *Wright v. Enomoto*[, 434 U.S. 1052 (1978)], *supra*, may be to the contrary, we have never held that statutes and regulations governing daily operation of a prison system conferred any liberty interest in and of themselves,"⁷ and, as a summary disposition, *Wright* is amenable to plenary revisitation without offending *stare decisis* simply by virtue of "adversary presentation." *Bancorp Mortgage Co.*, 115 S. Ct. at 391. See also Pet. Br. at 30-31 & n.17.⁸ *Hewitt's* holding that Pennsylvania

⁷ *Hewitt* also disposes of contentions that *Hughes v. Rowe*, 449 U.S. 5 (1980) (per curiam), "essentially a pleading case," see 459 U.S. at 469 & n.5, is precedent for Respondent's view. See also *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (also a "pleading case"). Likewise, the summary reversal in *Cox v. Cook*, 420 U.S. 734 (1975), hardly establishes the view of *Wolff Conner* (Resp. Br. at 32 n.21) and *amici* (ACLU Br. at 11) invoke.

⁸ Respondent's contention that our broader theory for reversal "would also require the overruling of *Vitek v. Jones*[, 445 U.S. 480 (1980)], and *Washington v. Harper*[, 494 U.S. 210 (1990)], Resp. Br. at 32 n.22, is groundless. Both cases involve "[c]ompelled treatment in the form of mandatory behavior

provided the "process due" renders its statements that the State had "created a protected liberty interest" dicta with regard to the argument deferred in *Thompson*. Neither Respondent nor his amici respond to this. Nor do they offer any explanation why this Court has repeatedly refused to enshrine into holding the dicta in footnote 19 of *Wolff v. McDonnell*. See, e.g., *Heck v. Humphrey*, 114 S. Ct. 2364, 2370 (1994); *Thompson*, 490 U.S. at 461; *Superintendent v. Hill*, 472 U.S. 445, 453 (1985); *Hewitt*, 459 U.S. at 460.

Wolff v. McDonnell, to be sure, stands for the proposition that where "the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior," "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances[.]" 418 U.S. at 557 (emphasis added). Respondent cannot (see Resp. Br. at 32-34), point to such a legal predicate here, and the "real substance" test, as both we (Pet. Br. at 36), and the amici States (New Hampshire Br. at 27-28) point out, is well grounded, and requires reversal regardless of any "mandatory" Hawaii prison rules.

Indeed, if there is one precedent that stands as a beacon, it is *Paul v. Davis*, 424 U.S. 693 (1976). Ironically,

modification programs" that "are qualitatively different from the punishment characteristically suffered by a person convicted of crime." *Vitek*, 445 U.S. at 493; see *Harper*, 494 U.S. at 222. For this reason, both *Vitek* and *Harper* fit comfortably within the broader theory for reversal here. See *Thompson*, 490 U.S. at 461 n.3. *Harper*, moreover, upheld Washington's procedures for the administration of antipsychotic medication, and is thus similar to *Hewitt* in terms of its precedential value.

Conner cites *Paul* in support of his "'positivist definition of property and liberty,'" see Resp. Br. at 36 & n.23, failing to recognize that the decision in *Paul* denied the existence of a federally protected liberty interest based on "positivist" notions of the law of libel, on the now well-accepted understanding that the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." 424 U.S. at 701. *Paul* establishes, clearly and emphatically, that there are particular contexts where federalization of state-created interests is inappropriate. Efforts by States to create manageable systems for "summarily maintaining prison order," *State v. Alvey*, *supra*, are, as this Court suggested in *Hewitt*, 459 U.S. at 471, one such context. *Stare decisis*, rather than supporting affirmance, demands reversal.

II. Both Respondent Conner and His Amici Underscore the Narrower Grounds for Reversal Based on the Discretion of Hawaii Prison Officials and the Procedural Nature of the Burden of Proof Rule Relied Upon by the Ninth Circuit.

Though the Court plainly can reverse on our broader theory, our Brief presents narrower grounds for reversal, mindful of the preference not to "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Wholly aside from the prudential considerations warranting indulgence of these alternative grounds, the attacks launched on them by Respondent and his amici fall flat under any reasoned analysis.

A. Respondent and Amici's Attack on Our Threshold view of *Thompson* and the Two-Way Mandatory Outcomes Test is Undermined by Their Own Precepts for Construing State Law.

Petitioner's first argument that even a "positivist" theory of "liberty interests" requires reversal rests on the following statement in *Thompson*, *supra*, characterizing the Reformatory Procedures Memorandum of the Kentucky Department of Corrections: "This language is not mandatory. Visitors *may* be excluded if they fall within one of the described categories, see n. 1, *supra*, but they need not be." 490 U.S. at 464 (emphasis in original). Fairly interpreted, this language supports the "two-way mandatory outcomes test" in this particular context, and that test compels reversal if, as all here concede, Hawaii's officials have discretion *not* to assign an inmate to disciplinary segregation even if there has been an admission of guilt or "substantial evidence" to "support" a disciplinary "charge." See Haw. Admin. R. § 17-201-18(b). Seen in context, the arguments against this ground for reversal are unconvincing.

Respondent and his amici rely on the language of *Thompson* which states that "[t]he overall effect of the regulations is not such that an inmate can reasonably form an objective expectation that a visit would necessarily be allowed absent the occurrence of one of the listed conditions" in the Memorandum. *Id.* at 465. See Resp. Br. at 24-26; ACLU Br. at 23-26. Those "listed conditions," however, were only subsets of the general mandate that, under Respondent's view, would have limited the Kentucky officials' discretion, in a manner that created an enforceable "liberty interest," to deny visits in

those cases where "[t]he visitor's presence in the institution would constitute a clear and probable danger to the safety and security of the institution." See 490 U.S. at 457 n.2. If Respondent's and his amici's principles for interpreting state regulations are correct (see Resp. Br. at 21-23; ACLU Br. at 34-44; Mandel Legal Aid Br. at 24-25), *Thompson* can be sensibly read *only* as adopting, in this limited context, a two-way mandatory outcomes test. Pet. Br. at 39. So read, *Thompson*'s requirement that "a particular result is to be reached upon a finding that the substantive predicates are met," 490 U.S. at 464, compels reversal because Petitioner "may" but "need not" assign an inmate to segregation for misconduct. See Haw. Admin. R. § 17-201-19.

B. Hawaii Has No Rule that Requires an Admission of Misconduct or a Finding of Misconduct Based on "Substantial Evidence"; and A Rule that Segregation Must Rest on "More than Mere Silence" Does Not Create a "Liberty Interest."

Respondent's and his amici's opposition to reversal, however, is most unpersuasive in ignoring *Thompson*'s admonition that "the mandatory language requirement is not an invitation to courts to search regulations for *any* imperative that might be found." 490 U.S. at 464 n.4. Thus, the fact that an admission of misconduct or the presence of "substantial evidence" of misconduct requires "[a] finding of guilt," Haw. Admin. R. § 17-201-18(b), does not require an "acquittal" if such predicates are not present. Respondent's contentions to the contrary (Resp. Br. 21) simply ignore the "overall effect" of the regulations as *Thompson* requires that "effect" to be evaluated. See 490 U.S. at 464-65 and Resp.

Br. at 24-25. In turn, the only issue⁹ on this front is whether the requirement of "more than mere silence" in Haw. Admin. R. § 17-201-18(b), triggers a "liberty interest" under *Thompson* and "positivist" Due Process doctrine.

Amici's suggestion (ACLU Br. at 39), that a requirement of more than "mere silence" could trigger a "liberty interest" is plainly wrong. Not only does it violate the interpretive principles of *Thompson* itself, compare 490 U.S. at 457 n.2, with *id.* at 465, it is at odds with this Court's view of Hawaii's classification rules in *Olim*, where limitations on the warden's ability to "hold in abeyance" recommended decisions, see 461 U.S. at 242-43, did not prevent the Court from concluding that state officials were "completely unfettered" in their transfer decisions.

⁹ Amicus ACLU, and no other party, asserts that the Attorney General of Hawaii has "interpreted the regulation just as the Ninth Circuit interpreted it" (ACLU Br. at 36), but this is not so. Neither the Question Presented nor the framing of Hawaii's rule in the Petition for Certiorari concede the issue, and both are sufficiently open-ended as to permit us to advance the contention that "the burden of proof is not 'substantial evidence'" (ACLU Br. at 38). The issue is "fairly included" within the Question Presented, and in any event the Ninth Circuit committed plain error in reading § 17-201-18(b) as it did, especially insofar as the construction we offer, which all parties have been able to brief, provides a narrow ground for decision. See S. Ct. R. 24.1(a); cf. *Frisby v. Schultz*, 487 U.S. 474, 483 (1988); *Ashwander v. TVA*, *supra*. Even if none of this is true, however, the proper reading of Hawaii's rule in light of *Thompson* is at a minimum "antecedent" and "ultimately dispositive of the present dispute," *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990), was "passed upon" by the Ninth Circuit, and raises a question "of importance to the administration of federal law" in an area "of evolving definition and uncertainty." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. ___, ___ n.8 (1991).

Id. at 249. Moreover, because segregation of an inmate on evidence consisting of nothing more than "mere silence" would come perilously close to – if it did not in fact constitute – an unconstitutionally irrational assignment under Equal Protection doctrine, Hawaii's subscription to the "some evidence" standard does not give rise to a "liberty interest," in that the rule allows officials to "' deny the requested relief for any constitutionally permissible reason.'" *Id.* (quoting *Board of Pardons v. Dumachat*, 452 U.S. 458, 467 (1981) (Brennan, J., concurring)). The fact that affirmance would do violence to the requirement of minimum rationality is perhaps the most compelling reason why the judgment below is wrong.

C. The Warden's Discretion Separately Requires Reversal.

Relying on this Court's interpretation of a federal statute, Respondent asserts that the facility Administrator's power unilaterally, and at his sole "discretion," "to modify any committee findings or decisions[.]" Haw. Admin. R. § 17-201-20(b), is insufficient to defeat a claimed "liberty interest" here. Resp. Br. at 22-23 & n.14 (quoting *MCI Telecommunications v. AT&T*, 114 S. Ct. 2223, 2229 (1994)). Petitioner respectfully submits that the principles for interpreting federal regulatory statutes are inapplicable in this context, where deference to state officials is at its height, see *Bell*, 441 U.S. at 547, as this Court's decisions in *Thompson* and *Olim*, *supra*, demonstrate. Moreover, assignment of a prison inmate generally, and particularly one already assigned to Halawa facility, even from general population to disciplinary segregation falls well within MCI's definition of the term "modify."

There is ample "basis in the regulations, Hawaii law [and] common sense" for the conclusion that Hawaii's rule delegates to the most senior official far greater discretion than is given to subordinates, *compare State v. Alvey, supra, with Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985), and the issue is not whether the warden was the decisionmaker who assigned Conner to segregation (ACLU Br. at 48), but whether the warden could have overridden an acquittal " 'for any constitutionally permissible reason.' " *Olim*, 461 U.S. at 249. For this reason, too, this Court should reverse.

D. Hawaii's Prison Regulations are Procedural Only.

Respondent and his *amici* do not dispute that "an expectation of receiving process is not, without more, a liberty interest," *Olim*, 461 U.S. at 250 n.12, but has no rebuttal to the claim that this rule ought to have counseled a different result below. Ultimately, Respondent's claim that "guilt must be demonstrated" (Resp Br. at 27), flies in the face of Hawaii law, which is emphatic that "[t]he disciplinary committee's objective is to maintain prison order and discipline," and not "to ascertain guilt or innocence." *State v. Alvey*, 67 Haw. at 56, 678 P.2d at 9. Thus, rather than ease federalism concerns (Resp. Br. at 35-36), Respondent's position is undercut by the very "positivist" theory (*id.*) that is central to his argument.

E. Separate Authority to Transfer to the Special Holding Unit Dispels Any Federal Claim to A "Liberty Interest."

Conner agrees "[t]his Court has previously found that Hawaii prison regulations do not limit the discretion

of prison officials to transfer a prisoner" (Resp. Br. at 28 n.17), and it is clear that abundant authority exists to place inmates in the SHU without any of the proof assertedly required for disciplinary segregation.¹⁰ See Pet. Br. at 47-48. Although Conner does not dispute that his ability to avoid the SHU was never " 'securely and durably' " his, *Wallace v. Robinson*, 940 F.2d 243, 246 (7th Cir. 1991) (en banc), he complains that this ground for reversal (Pet. Br. 45-47) "lacks a coherent rationale" and would "lead to increased litigation and uncertainty." (Resp. Br. at 29-30). Yet, it is Conner's own theory that requires him to show a "legitimate claim of entitlement" to avoid segregation in the SHU, and, given the alternative routes to that housing assignment, and the lack of any "collateral consequence" other than a rebuttable libel, Conner's case plainly fails. Conner's own affidavit concedes conditions for inmates in the SHU were "virtually" "one and the same" regardless of how inmates were placed there, see J.A. 84, and, if all else fails, that requires reversal.

CONCLUSION

For the reasons above, in our Brief, and in that of the *amici* States, the judgment of the Court of Appeals should be reversed. Should the Court rule against Petitioner on the "liberty interest" issue, the Court should reverse the Ninth Circuit's denial of immunity under the "plain error" standard, or at a minimum, should vacate the judgment denying immunity and remand to the Court of

¹⁰ The Ninth Circuit's decision in *Schroeder v. McDonald*, ___ F.2d ___ (9th Cir. 1994), is based largely on reasoning similar to that under review here, and is the subject of a petition for rehearing and request for stay pending a decision in this case.

Appeals for further consideration in light of the grant of certiorari and the Court's opinion here.

Dated: Honolulu, Hawaii, January 4, 1995.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CINDA SANDIN, Unit Team Manager,
Halawa Correctional Facility, Hawaii,
Petitioner,
vs.

DEMONT R. D. CONNER,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

When an inmate, already sentenced to prison, is assigned to disciplinary segregation, with no direct impact on the duration of his prison sentence, is that assignment a deprivation of liberty within the meaning of the Due Process Clause?

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TABLE OF AUTHORITIES

Cases

Arnett v. Kennedy, 416 U. S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974)	6, 8
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Board of Pardons v. Allen, 482 U. S. 369, 96 L. Ed. 2d 303, 107 S. Ct. 2415 (1987)	13, 16
Board of Regents v. Roth, 408 U. S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972)	9, 10
Carroll v. United States, 267 U. S. 132, 69 L. Ed. 543, 45 S. Ct. 280 (1925)	8
Cleveland Board of Education v. Loudermill, 470 U. S. 532, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985)	8
Connecticut Board of Pardons v. Dumschat, 452 U. S. 458, 69 L. Ed. 2d 158, 101 S. Ct. 2460 (1981)	12, 15
Conner v. Sakai, 15 F. 3d 1463 (CA9 1993)	3
Dolan v. City of Tigard, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994)	11
Goldberg v. Kelly, 397 U. S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970)	8, 9
Graham v. Richardson, 403 U. S. 365, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971)	6
Greenholtz v. Nebraska Penal Inmates, 442 U. S. 1, 60 L. Ed. 2d 668, 99 S. Ct. 2100 (1979)	12, 15
Hewitt v. Helms, 459 U. S. 460, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983)	12, 13, 15, 17
Hudson v. Palmer, 468 U. S. 517, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984)	5
Jago v. Van Curen, 454 U. S. 14, 70 L. Ed. 2d 13, 102 S. Ct. 31 (1981)	15

Jay v. Boyd, 351 U. S. 345, 100 L. Ed. 1242, 76 S. Ct. 919 (1956)	6
Kentucky Dept. of Corrections v. Thompson, 490 U. S. 454, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989)	13-16
LeMaire v. Maass, 12 F. 3d 1444 (CA9 1993)	17
Meachum v. Fano, 427 U. S. 215, 49 L. Ed. 2d 451, 96 S. Ct. 2532 (1976)	11, 15, 17
Montanye v. Haymes, 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 2543 (1976)	15
Morrissey v. Brewer, 408 U. S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972)	10, 11, 14
Nichols v. United States, 128 L. Ed. 2d 745, 114 S. Ct. 1921 (1994)	16
Olim v. Wakinekona, 461 U. S. 238, 75 L. Ed. 2d 813, 103 S. Ct. 1741 (1983)	15
Payne v. Tennessee, 501 U. S. 808, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991)	16
Shapiro v. Thompson, 394 U. S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969)	8
Sherbert v. Verner, 374 U. S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963)	8
Sniadach v. Family Finance Corp., 395 U. S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969)	8
Spain v. Procunier, 600 F. 2d 189 (CA9 1979)	16
Toucey v. New York Life Ins. Co., 314 U. S. 118, 86 L. Ed. 100, 62 S. Ct. 139 (1941)	16
Turner v. Safley, 482 U. S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987)	14
United States ex rel. Knauff v. Shaughnessy, 338 U. S. 537, 94 L. Ed. 317, 70 S. Ct. 309 (1950)	6

- Vasquez v. Hillery, 474 U. S. 254, 88 L. Ed. 2d 598,
106 S. Ct. 617 (1986) 16
- Vitek v. Jones, 445 U. S. 480, 63 L. Ed. 2d 552,
100 S. Ct. 1254 (1980) 14, 15
- Weaver v. Graham, 450 U. S. 24, 67 L. Ed. 2d 17,
101 S. Ct. 960 (1981) 15
- Wolff v. McDonnell, 418 U. S. 539, 41 L. Ed. 2d 935,
94 S. Ct. 2963 (1974) 7, 11, 12, 14

United States Constitution

- U. S. Const., Amdt. 14, § 1 7

Treatises

- 1 W. Blackstone, Commentaries (1st ed. 1765) 11, 14
- 2 W. Blackstone, Commentaries (1st ed. 1766) 9
- 1 S. Williston, Contracts (4th ed. 1990) 10

Miscellaneous

- Doumar, Prisoners' Civil Rights Suits: A Pompous Delusion,
11 George Mason L. Rev. 1 (1988) 2
- Farmer, A Case Study in Regaining Control of a Violent State
Prison, 52 Fed. Prob. 41 (March 1988) 5
- The Federalist No. 45 (C. Rossiter ed. 1961)
(J. Madison) 9
- V. Fox, Correctional Institutions (1983) 4, 5
- Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267
(1975) 7
- L. Hand, The Spirit of Liberty (1st ed. 1952) 5
- Robertson, Surviving Incarceration: Constitutional Protection
from Inmate Violence, 35 Drake L. Rev. 101 (1985) ... 4

- Simon, Liberty and Property in the Supreme Court:
A Defense of *Roth* and *Perry*, 71 Cal. L. Rev. 146
(1983) 6, 10
- Smolla, The Reemergence of the Right-Privilege Distinction
in Constitutional Law: The Price of Protesting Too Much,
35 Stan. L. Rev. 69 (1982) 6
- U. S. Dept. of Justice, Bureau of Justice Statistics,
Sourcebook of Criminal Statistics 1993 (1994) 1, 2

IN THE
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OCTOBER TERM, 1994

CINDA SANDIN, Unit Team Manager,
Halawa Correctional Facility, Hawaii,

Petitioner,

vs.

DEMONT R. D. CONNER,

Respondent.

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)¹ is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Adequate punishment of the massive amounts of crime we now have in the United States requires a massive expenditure of public funds. Although the total rate of crime has declined slightly since the get-tough attitude took hold, U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Statistics 1993, p. 352 (1994) (rate per 100,000 pop. peaked in

1. Both parties have given written consent to the filing of this brief.

1980), it will be many years before the level is reduced to where it was in the 1950's. In the meantime, any incremental cost per prisoner will be multiplied by a massive number of prisoners.

One of those costs is prisoner litigation. Prisoner civil rights cases filed in federal courts by state prisoners multiplied fivefold in 16 years, *id.*, at 550, a much faster increase than the growth of the prison population. Cf. *id.*, at 600. As one federal judge put it, "Prisoner suits seeking to enforce constitutional rights have become a gigantic farce." Doumar, Prisoners' Civil Rights Suits: A Pompous Delusion, 11 George Mason L. Rev. 1, 1 (1988).

By using up scarce resources, excessive prisoner litigation detracts from the ability of the state to properly punish crime and protect the law-abiding public, and is therefore contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The federal magistrate in the present case described plaintiff DeMont R. D. Conner thusly:

"Plaintiff has been convicted of multiple violent crimes including attempted murder, kidnapping, burglary, robbery and rape. He has been sentenced to life imprisonment and his minimum term has been set at 30 years, which includes a 5-year consecutive sentence for escape.

"While incarcerated, he has committed numerous misconducts involving assaults or attempted assaults on other inmates and staff, as well as misconducts involving threats to, interference with, harassment and abuse of staff.

"Plaintiff has twice attempted escape. The first time resulted in his conviction for attempted escape in the second degree on April 4, 1985. The second attempt resulted in a misconduct charge on September 4, 1984. In short, given the length of his sentence and his manifest predilection for violence, Plaintiff appears to present the stereo typical criminal over which the State has little control or leverage." Report and Recommendation Granting Defendant's Motion for Summary Judgment 4.

The present litigation involved numerous claims, but Conner only prevailed on two, *Conner v. Sakai*, 15 F. 3d 1463, 1471 (CA9 1993), one of which became moot. Pet. for Cert. 9, fn. 1.

Conner was accused of misconduct during a routine search for contraband. *Id.*, at 6-8. He was initially assigned to 4 hours in disciplinary segregation on two minor charges and 30 days on the most serious charges. The latter, however, were reversed on review within the prison system. App. to Pet. for Cert. A66-A67.

Conner filed a civil rights suit claiming, among other things, that committee chairman Cinda Sandin did not permit him to call witnesses. The District Court granted defendant's motion for summary judgment on this claim, but the Ninth Circuit Court of Appeals reversed as to defendant Sandin. 15 F. 3d, at 1467-1468.

The discipline imposed in this case causes no loss of good time credit (which Hawaii does not have), nor does it necessarily have any effect on parole. Pet. for Cert. 6. This Court granted certiorari limited to the question of whether, under such circumstances, the inmate has a "liberty interest" in avoiding disciplinary segregation." Pet. for Cert. i; Order Granting Petition for Writ of Certiorari, Oct. 7, 1994.

SUMMARY OF ARGUMENT

Judicial interference in prison discipline affects more than the public purse. An undisciplined prison is a chamber of horrors. Protection of the weaker inmates from cruelties far beyond the limits of the Eighth Amendment requires swift and sure discipline.

The line of cases dealing with "state-created liberty interests" is fundamentally flawed. A method of analysis developed for property and appropriate to property has been applied to liberty without careful consideration of the difference between them.

Where the plaintiff has previously been sentenced to incarceration *with* due process of law, the only question should be whether the challenged action constitutes such a qualitative change in the *type* of custody, and not merely a greater *degree*

of restriction within previously authorized custody, as to constitute *a new* deprivation of liberty. If not, the Due Process Clause is inapplicable, and the state should be free to construct its own procedures, without fear that too much structure will result in burdensome judicial control.

Adoption of this standard would not change the result of the bulk of prisoner due process cases.

ARGUMENT

I. The persons who will suffer the most from a lack of prison discipline are the weaker prisoners.

Prison discipline cases come to court in the form of the individual prisoner on one side and the institution and its officers on the other. Unseen and unheard in this confrontation are other people who have a very real interest in its outcome: other prisoners for whom a breakdown in discipline can mean grievous injury or even death.

Too often, being imprisoned "is to experience a Hobbesian world; one encounters 'a barely controlled jungle where the aggressive and the strong will exploit the weak and the weak are dreadfully aware of it.'" Robertson, *Surviving Incarceration: Constitutional Protection from Inmate Violence*, 35 Drake L. Rev. 101, 102 (1985). It is difficult to measure the precise level of prison violence because of "the convict norm prohibiting 'squealing' on fellow prisoners." *Id.*, at 104. The estimates that have been made, however, are unsettling. One estimate places the homicide rate in prisons at eight times the national level. See V. Fox, *Correctional Institutions* 108 (1983). Assault rates are even higher. See Robertson, *supra*, 35 Drake L. Rev., at 105. Rape, "the grayest area of the statistical map of prison violence," is the threat most exacerbated by prison life. Even the most conservative estimates report that rape within prison is as prevalent as heterosexual rape outside of prison, while one study found that "73.9% of the inmates interviewed at the Tennessee state prison were aware of at least one rape per month." See *ibid.* It is little wonder that the climate of fear in prisons can be overwhelming. As one inmate's account illustrates:

"I ate with my back to the wall. I showered with my back to the wall—and never dropped my soap, or just left it if I did. When I went to the movies, I made sure a friend was behind me, and noticed everyone in the vicinity. If I went to the yard, which was seldom, I kept the gun tower in my sight. At night, all my cellmate had to do was so much as move a muscle—or think about it—and I was wide awake." *Id.*, at 105-106 (quoting G. Myron, *Maximum Security Letters from Prison* 45 (1972)).

Discipline is essential to keep prison life from turning into a true state of nature. "Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct." *Hudson v. Palmer*, 468 U. S. 517, 526 (1984). The inmates "have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others." *Ibid.* The social contract that binds us in normal society is not enough; tight discipline must be the order of the day in prisons. "A society in which men recognize no check upon their freedom soon becomes a society where freedom is only in the possession of a savage few; as we have learned to our sorrow." L. Hand, *The Spirit of Liberty* 190 (1st ed. 1952). Justice Hand's admonition is even more relevant to the closed, anti-social community of prisons.

"The only way in which it [prison violence] can be controlled is by developing an authoritarian society managed by an authoritative administration. This does not mean that the administration has to meet violence with violence, rather *the prison must have sufficient controls so that violence is contained.*" Fox, *supra*, at 96-97 (emphasis added). The Due Process Clause must not be used to straitjacket efforts to protect inmates from each other. Prison administrators need to be able to act flexibly, quickly, and decisively in order to limit prison violence. Cf. Farmer, *A Case Study in Regaining Control of a Violent State Prison*, 52 Fed. Prob. 41, 44-45 (March 1988) (possible riot averted in Walpole State Prison, Massachusetts, when ten suspected ringleaders were rounded up at 3 a.m. and bussed to a federal prison in Wisconsin).

The cost of applying the Due Process Clause to prison discipline does not lie solely, or even primarily, in the mandated

procedures themselves. "The real burden accrues not from the task itself, . . . but from the fact that its performance is judicially commanded and judicially enforced." Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 Cal. L. Rev. 146, 159 (1983). A judicially created requirement means that courts must review whether the procedures are adequate and whether they have been complied with in a particular case. Small wonder, then, that the volume of prisoner litigation has been rising much faster than the prison population. See *ante*, at 1. As much of a burden as this places on courts, it places a greater one on the prisons.

If the cost of imposing punishment is excessive, it stands to reason it will be imposed less often, resulting in a decline in discipline. A court that excessively interferes with prison discipline may be sentencing the weaker prisoners to a fate far worse than anything we would tolerate under the Eighth Amendment.

II. The Due Process Clause should only apply to changes in custody qualitatively different from that authorized by the original sentence.

A. Rights, Privileges, and Screens.

As recently as the 1950's, a key question in due process cases was whether the case involved a "right" as opposed to a mere "privilege" or "matter of grace." See *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537, 544 (1950); *Jay v. Boyd*, 351 U. S. 345, 354-355 (1956). No constitutional procedural protections applied to the latter. Whatever process the legislative authority provided was *per se* all that was due. *Knauff*, 338 U. S., at 544.

After a long illness, the right-privilege distinction was pronounced dead in 1971. *Graham v. Richardson*, 403 U. S. 365, 374 (1971). In the years since, it has become fashionable to refer scornfully to the "thoroughly discredited distinction between rights and privileges" See *Arnett v. Kennedy*, 416 U. S. 134, 211 (1974) (Marshall, J., dissenting). One commentator has gone so far as to call two well-known opinions of Justice Holmes "infamous." Smolla, *The Reemergence of the*

Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much, 35 Stan. L. Rev. 69, 83 (1982).

Despite all the insults heaped upon it, the right-privilege distinction did perform an essential function. While doctrines can be abandoned or even "discredited," essential functions must go on, precisely because they are essential.

The constitutional provision in question states, "nor shall any State deprive any person of life, liberty, or property, without due process of law" U. S. Const., Amdt. 14, § 1. When any action of government is challenged under this clause, two questions necessarily arise. Has the state deprived the person of life, liberty, or property, and, if so, what process was due?

If the minimum answer to the second question is "some kind of hearing," see *Wolff v. McDonnell*, 418 U. S. 539, 557-558 (1974), then the first question *must* set some kind of floor. "Good sense would suggest that there must be some floor below which no hearing of any sort is required." Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1275 (1975). Government would grind to a halt if *every* decision adverse to anyone had to be preceded by a hearing and followed by a lawsuit. If the Justices of this Court had to hold a hearing for every applicant not hired as a law clerk, there would be no time to write opinions. In times gone by, such claims would have been screened out by the principle that government employment is a privilege and not a right. *Bailey v. Richardson*, 182 F. 2d 46, 58 (CA DC 1950), *aff'd* by an equally divided court, 341 U. S. 918 (1951). This screening function was essential, and it had to be replaced.

B. Explosion and Containment.

In the early 1970's, we "witnessed a due process explosion in which the Court has carried the hearing requirement from one new area of government action to another" Friendly, *supra*, 123 U. Pa. L. Rev., at 1268. One British jurist, after an exchange program, "said that the main value of the enterprise from the English standpoint had been to observe the horrible American examples of over-judicialization of administrative procedures and undue extension of judicial review, and to learn not to do likewise." *Id.*, at 1269.

Goldberg v. Kelly, 397 U. S. 254 (1970) spearheaded the extension of judicial review. The cases on which *Goldberg* principally relied involved either deprivations of property in the traditional, tangible sense, *id.*, at 267 (citing *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969)), or interference with rights long recognized as fundamental. *Id.*, at 262 (citing *Shapiro v. Thompson*, 394 U. S. 618 (1969) (interstate travel); *Sherbert v. Verner*, 374 U. S. 398 (1963) (free exercise of religion)). The *Goldberg* case involved neither, but dealt with the procedures required for termination of welfare benefits. 397 U. S., at 255-257.

Relying on the writings of Charles Reich, *Goldberg* likened welfare benefits to property. *Id.*, at 262, n. 8. This is not property as it was understood at the time the Fourteenth Amendment was adopted. It is "new property," see *ibid.*, which has been created by legislative action. Yet *Goldberg* holds, in effect, that the legislative authority which is competent to create previously unknown property rights is *not* competent to decide what process is due in adjudicating whether a particular person is or is not entitled to the new property. "New property" is thus a constitutional Frankenstein's monster, beyond the control of its creator. There was a brief rebellion against this notion of divided competence, *Arnett v. Kennedy*, 416 U. S. 134, 152 (1974) (plurality opinion), but it has been quelled. See *Cleveland Board of Education v. Loudermill*, 470 U. S. 532, 541 (1985).

If the legislature is not competent to decide what process is due, then where do we look? One could look to the common law, which requires a judicially-issued warrant for most seizures of property. See *Carroll v. United States*, 267 U. S. 132, 156 (1925). The administrative state would collapse under such a burden. *Goldberg* thus rejected a judicial hearing and proceeded to promulgate its own standards for the necessary incidents of the required administrative hearing. 397 U. S., at 266-271.

As an abstract statement, it is hard to disagree with *Goldberg's* assertion that the extent of process required depends upon a weighing of interests. *Id.*, at 263. The critical question is *in whose opinion* does the need for a particular procedure outweigh the burden of providing it? With concrete guidance in neither the Constitution nor the common law, the *Goldberg*

Court effectively holds that its opinion as to what is fair trumps the opinions of the elected branches. The separation of powers implication of this holding did not go unnoticed. *Id.*, at 273-274 (Black, J., dissenting).

Two years after *Goldberg*, the Court recognized the need for a limiting principle in *Board of Regents v. Roth*, 408 U. S. 564 (1972). Even while emphatically rejecting the "wooden distinction between 'rights' and 'privileges,'" *id.*, at 571, *Roth* sought a replacement for the essential function served by that distinction:

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite." *Id.*, at 569-570 (footnote omitted).

So instead of "rights" and "privileges," we have "protected interests" and other things which are either not interests or not protected. "Property" is not limited to "real estate, chattels, or money," *id.*, at 571-572,² and deprivations of liberty are not limited to penal incarceration. *Id.*, at 572.

The plaintiff in the *Roth* case was a college professor hired for a single year and not hired the following year. He claimed a due process right to a hearing before the nonrenewal decision. *Id.*, at 566, 569. In deciding whether he had a protected interest, the Court examined liberty first and property second, but the reverse order is more illuminating for the present discussion.

"Property interests, of course, are not created by the Constitution." *Id.*, at 577. Nor did people in a state of nature have any "right" to property; they had whatever they could obtain and hold by force. Property interests must be created by law, usually state law. See *The Federalist* No. 45, pp. 292-293 (C. Rossiter ed. 1961) (J. Madison).

2. Nor was it so limited in the common law, which recognized a bewildering array of property interests, including public offices and franchises. See 2 W. Blackstone, *Commentaries* 36-37 (1st ed. 1766).

The same substantive law that creates the property interest is necessarily competent to establish its duration. If that law establishes a termination date and creates no obligation to renew that contract, then there simply is no *property* interest beyond that date. 408 U. S., at 578. The fact that the university officials did not need any cause to not renew, and therefore had complete discretion, was dispositive.

This approach is fully consistent with the common understanding of what it means to have a property interest, "an interest one can insist upon, rather than one which turns upon the good will of another." Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 Cal. L. Rev. 146, 171 (1983).³ The difference between a promise which is adequate to form a contract (if other requirements are met), and hence to create a property right in the promisee, and a mere illusory promise, which creates no enforceable rights, is that in the latter the promisor can simply change his mind. 1 S. Williston, *Contracts* § 1:2, p. 11 (4th ed. 1990).

Turning back to the liberty analysis in *Roth*, we see that the terms of Roth's appointment, so central to the property analysis, is conspicuous by its absence. Part II of the opinion contains not a word about whether the renewal decision was mandatory or discretionary. Instead, the holding that there was no deprivation of liberty is premised on the fact that Roth's freedom of action is not hindered by the government. "[H]e simply is not rehired in one job but remains as free as before to seek another." 408 U. S., at 575.

This point is reinforced by another "liberty" case decided the same day, *Morrissey v. Brewer*, 408 U. S. 471 (1972). The question was whether an opportunity to be heard was required before revoking parole. *Id.*, at 472. The Court reiterated the rejection of the right-privilege distinction, and also rejected the idea that the weight, rather than the nature, of the interest was determinative. *Id.*, at 481.

3. Simon is in the academic minority, with most of the commentary on *Roth* being negative. See *id.*, at 178-190 (responding to critics). The fact that the academic majority prefers the result favored by the political left occurs with such regularity that it no longer has any significance.

Significantly for the present case, *Morrissey* does not undertake a detailed examination of the parole statute of the jurisdiction in question, although the Court discusses parole in general. See *id.*, at 477-480. The holding that revocation of parole constitutes a deprivation of liberty, requiring due process, turns not on the criteria for revocation or the discretionary nature of the decision, but instead on the enormous difference in freedom between parolees and incarcerated prisoners. *Id.*, at 481-482. While both are in custody, the restraints differ in kind and not merely in degree.

This difference in approach, *amicus* submits, was entirely appropriate. Liberty and property are different kinds of interests, and different considerations determine whether one is deprived of liberty, as opposed to property. The very essence of property is the right to use the thing owned to the exclusion of others. *Dolan v. City of Tigard*, 129 L. Ed. 2d 304, 316, 114 S. Ct. 2309, 2316 (1994). A person claiming a property interest must therefore be able to point to some affirmative source of that exclusive right, and that source must be one recognized in law.

Liberty is different. Liberty is freedom from government restraint. People have complete liberty in a state of nature, but to live in a civilized society we surrender a portion of our natural liberty, which is limited by duly enacted laws. 1 W. Blackstone, *Commentaries* 121 (1st ed. 1765). While property interests can only be *created* by law, liberty can only be *limited* by law. *Meachum v. Fano*, 427 U. S. 215, 230 (1976) (Stevens, J., dissenting). There is simply no such thing as a state-created liberty interest. When a person's natural liberty is restricted, that restriction is imposed either with or without due process of law. However faulty its final conclusion, the *Meachum* dissent was correct on the basic approach.

The state-created interest approach seems to have slithered sideways from property into liberty without a careful consideration of the difference. In *Wolff v. McDonnell*, 418 U. S. 539, 557 (1974), the Court characterized "good time" credits (which shorten a prison sentence) as a state-created right and then declared that the "analysis as to liberty parallels the accepted due process analysis as to property." Because these credits could be lost only for serious misconduct, procedural due process applied. *Id.*, at 558. A footnote of pure dictum rendered an advisory

opinion that the same analysis would apply to disciplinary confinement. *Id.*, at 571, n. 19. On the other hand, the state law in *Meachum, supra*, vested the state officials with complete discretion to assign prisoners to various prisons, and hence there was no state-created interest to avoid such a transfer. 427 U. S., at 226-227.

C. Prisoner Cases Since *Wolff*.

In the years since *Wolff*, the Court has continued to adhere to the approach of looking at the statute to see how much discretion corrections officials have, but the course has not been smooth. In *Greenholtz v. Nebraska Penal Inmates*, 442 U. S. 1, 11-12 (1979), the state standards for granting parole were vague and subjective, and they called for prediction of future behavior, rather than determination of past facts. Without saying why, the majority accepted "respondents' view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection," *id.*, at 12, but held that procedures used were adequate. *Id.*, at 16.

Conversely, *Connecticut Board of Pardons v. Dumschat*, 452 U. S. 458 (1981), the board had "unfettered discretion" to commute sentences, with "no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied to the Board." *Id.*, at 466. Therefore, the state was not required to explain its decisions to federal courts. *Id.*, at 467.

The paradoxical message to the states of these two cases comes through loud and clear. To avoid being haled into federal court, make your prison officials absolute autocrats like the warden in "Cool Hand Luke." Create any standards, any structure, any guidance, and you will spend scarce time and resources in litigation and surrender ultimate control of your procedures to a life-tenured, unaccountable judiciary.

Hewitt v. Helms, 459 U. S. 460 (1983), which comes the closest to the present case, recognizes this problem. "It would be ironic to hold that when a State embarks upon such desirable experimentation [with procedural guidelines for discipline] it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedural provisions

entirely avoid the strictures of the Due Process Clause." *Id.*, at 471. Yet *Hewitt* then proceeds to parse the language of the statute, and based on the choice of words finds "that the State has created a protected liberty interest." *Id.*, at 472.

The triumph of form over substance reached its peak in *Board of Pardons v. Allen*, 482 U. S. 369 (1987). Although using the word "shall," the statute based parole on whether the board believed "the prisoner can be released without detriment to the prisoner or to the community" and whether "he is able and willing to fulfill the obligations of a law-abiding citizen." *Id.*, at 376-377. While this may be fact-finding in form, it is unfettered discretion in reality. See *id.*, at 384 (O'Connor, J., dissenting). Even while giving the wrong answer, the *Allen* majority notes its doubts about whether it is asking the right question. *Id.*, at 373, n. 3.

The Court then leapt from pillar to post in *Kentucky Dept. of Corrections v. Thompson*, 490 U. S. 454 (1989). That case involved the question of whether the prison inmates had a "liberty interest" in receiving certain visitors. *Id.*, at 455. *Thompson* said that no liberty interest was created because "the regulations are not worded in such a way that an inmate could reasonably expect to enforce them against the prison officials." *Id.*, at 465. That would be a reasonable standard if the Court were to stay with the state-created liberty interest approach, but it does not come close to explaining the previous decision in *Board of Pardons v. Allen, supra*. How could one enforce in a court of law a regulation requiring release upon the intangible standards in the *Allen* case? The only way a court could "enforce" that regulation would be to substitute its own opinion as to the prisoner's ability and willingness to be a law-abiding citizen.

Allen and *Thompson* do not differ in the enforceability of the regulations in any real-world sense. The only difference is in the form of words the respective drafters chose to use. For one of the most important provisions of our Constitution to apply or not apply depending on the hollow form of words without substance indicates that something is gravely amiss.

D. A Unitary Approach.

What is amiss, *amicus* submits, is the whole notion of state-created liberty interests. As noted earlier, *ante*, at 11, law can only limit liberty, not create it, for without law there is total liberty. The correct question in prisoner cases is whether the prisoner has suffered a *new* deprivation of liberty of constitutional magnitude, beyond the deprivation suffered *with* due process of law upon the original conviction and sentence, as modified by subsequent proceedings. This is substantially the same as the question traditionally phrased as whether the interest is "guaranteed directly by the Due Process Clause." *Thompson*, 490 U. S., at 460. State law is relevant only as to the extent of the original deprivation and as to whether the sentence has been modified, such as by an executed commutation or parole.

As the *Wolff* Court noted long ago, a sentence to prison does not terminate all constitutional rights. *Wolff v. McDonnell*, *supra*, 418 U. S., at 555-556. Indeed, the Cruel and Unusual Punishments Clause was inserted in the Bill of Rights specifically for the benefit of convicted persons. Prisoners also retain a variety of other rights which are not incompatible with their status or with prison administration. See, e.g., *Turner v. Safley*, 482 U. S. 78, 97-98 (1987) (marriage).

However, the deprivation of "liberty," in its core meaning of the right to move without restraint, 1 Blackstone, *supra*, at 130, is the essence of the punishment imposed by a sentence to prison. The formerly free person has, by choosing to commit a felony, forfeited his freedom and been placed in the custody of state officials. That custody includes the power to place the inmate in a particular cell in a particular prison, as well as to make numerous other decisions for him that free adults make for themselves.

Returning to the original approach of *Morrissey*, *amicus* believes that the correct approach is to look at the change in custody caused by the challenged action and ask whether the inmate is being subjected to a different *kind* of custody as opposed to a greater *degree* of confinement within a particular kind. See *Morrissey*, *supra*, 408 U. S., at 481-482. Is the new custody *qualitatively* different? See *Vitek v. Jones*, 445 U. S. 480, 493 (1980).

In the case of revocation of good-time credits in *Wolff*, the question would be whether the inmate continues in a different kind of custody from the kind he would have been in as a matter of course, had the authorities taken no action. Under a good time credit system, a sentence to a particular term is, with good behavior, actually a sentence to a shorter term. Legislative reduction of credits is an *ex post facto* increase in punishment, *Weaver v. Graham*, 450 U. S. 24, 35-36 (1981), and individual revocation is a new deprivation of liberty.

The fact that a state chooses to place some structure on its administrators' decisions should not obligate the state to litigate those decisions in federal court. Such a salutary development ought to be encouraged, not punished. Keeping this structure within the discretion of prison officials will encourage the swift and sure discipline needed to deal with the overwhelming horror of inmate violence. See *ante*, at 4-6.

The approach we propose would only change the result in one of the entire series of prisoner due process cases. The prisoners would still prevail in *Morrissey* and *Wolff*, because these cases involve people who were outside the prison, or would have been outside in due course. Also in *Vitek v. Jones*, *supra*, the change from state prison to a mental hospital was a change to a different kind of custody, 445 U. S., at 493, which is a new deprivation requiring due process.

All but one of the cases that found a state-created liberty interest without a change in the type of custody found that the minimal process provided was all that was due. *Greenholtz v. Nebraska Penal Inmates*, *supra*, 442 U. S., at 16; *Hewitt v. Helms*, *supra*, 459 U. S., at 477. The state would also have prevailed if these cases had simply said that no process was required by federal law. Naturally, the cases which found no state-created interest would also be decided the same. See *Meachum v. Fano*, *supra*, 427 U. S., at 229; *Montanye v. Haymes*, 427 U. S. 236, 243 (1976); *Connecticut Board of Pardons v. Dumschat*, 452 U. S. 458, 467 (1981); *Jago v. Van Curen*, 454 U. S. 14, 21 (1981) (*per curiam*); *Olim v. Wakinekona*, 461 U. S. 238, 250-251 (1983); *Kentucky Dept. of Corrections v. Thompson*, 490 U. S. 454, 465 (1989).

The one case that would have had a different result under the standard we propose is *Board of Pardons v. Allen*, *supra*. That case made an unwarranted judicial intrusion into a core executive function, and should be overruled.

E. *Stare Decisis*.

The principal objection to scrapping the notion of state-created liberty interests would be the doctrine of *stare decisis* and the number of cases that have been decided under that rubric. But a closer look at the values underlying the doctrine diminishes this concern.

The main force behind *stare decisis* is the settled expectations of people who arrange their affairs in reliance on court decisions. Reliance is rarely a factor in procedural cases. See *Payne v. Tennessee*, 501 U. S. 808, 828 (1991); *Toucey v. New York Life Ins. Co.*, 314 U. S. 118, 140 (1941). Given that this Court has almost always found state-provided procedure adequate for state-created liberty interests, abandonment of that doctrine will change few, if any, procedures and upset few, if any, expectations.

Stability itself has value, *Vasquez v. Hillery*, 474 U. S. 254, 265-266 (1986), but stability implies a consistent line of authority. When one case requires enforceable criteria for a state-created interest, *Thompson*, 490 U. S., at 465, and another case finds such an interest with the vaguest, least enforceable criteria imaginable, *Allen*, 482 U. S., at 376-377, any call for stability rings hollow. The statement of *Nichols v. United States*, 128 L. Ed. 2d 745, 753-754, 114 S. Ct. 1921, 1926-1927 (1994) about a single, splintered precedent applies as well to an inconsistent line of precedent. Where the line provides no coherent guidance for lower courts, the purpose of *stare decisis* is not served, and that is reason enough to reconsider the issue.

For the present case, the question is whether temporary assignment to more restrictive confinement is a change in kind of custody so as to amount to a *new* deprivation of liberty, which requires due process. We can put to one side detentions so severe they amount to cruel and unusual punishment. They can be attacked substantively regardless of how much process is provided, see, e.g., *Spain v. Procunier*, 600 F. 2d 189, 199

(CA9 1979), although some inmates are so impossible that otherwise cruel measures become necessary. See *LeMaire v. Maass*, 12 F. 3d 1444, 1458 (CA9 1993).

In this case, as in most prison discipline cases, we are dealing with a temporary removal to a more restrictive confinement for a period far less than the length of the sentence. This does not approach the magnitude of parole revocation or commitment to a mental hospital. It is more like assignment to a different prison. Cf. *Hewitt*, *supra*, 459 U. S., at 468; *Meachum*, *supra*, 427 U. S., at 225. It is not a new deprivation, but within the deprivation of liberty made *with* due process of law when the inmate was sentenced.

Because there has been no new deprivation of liberty of constitutional magnitude, no process is constitutionally required. The state can provide the process it believes fairness and regularity require, without being haled into court to have federal judges second-guess its decision.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

November, 1994

Respectfully submitted,

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No. 93-1911

In the
Supreme Court of the United States

October Term, 1994

◆
CINDA SANDIN, UNIT TEAM MANAGER,
HALAWA CORRECTIONAL FACILITY,
Petitioner,

v.

DEMONT R.D. CONNER, ET AL.,
Respondents.

◆
On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

◆
BRIEF OF THE STATES OF NEW HAMPSHIRE, et al.
AS AMICI CURIAE
IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a maximum security state prison inmate who is not subject to a loss of good time credit, nor to any necessary impact on parole, but who "may be" subjected to disciplinary segregation for violation of prison rules, has a "liberty interest" in avoiding disciplinary segregation solely because state prison disciplinary rules require a disciplinary committee to find "substantial evidence" of a rule infraction before deciding whether and to what extent to order the inmate segregated?

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INTEREST OF THE AMICI CURIAE

This brief in support of the Petitioner is submitted on behalf of New Hampshire and the 36 other signature States and Territories ("the Amici States") through their Attorneys General pursuant to Supreme Court Rule 37.5. The Amici States have an important interest in this case because they each operate correctional facilities which require systems of inmate control that employ segregated confinement techniques for both administrative and disciplinary purposes, and administer these facilities through the use of written standards and safeguards. States, and their employees, are commonly subjected to suit under 42 U.S.C. §1983 for routine correctional activities alleged to violate the due process rights of prison inmates.

The Court has recognized that the administration of prisons is a matter "of acute interest to the States." *Meachum v. Fano*, 427 U.S. 215, 229 (1976).

STATEMENT OF THE CASE

This case arises from a Hawaii State Prison inmate's 42 U.S.C. §1983 claim alleging that prison officials violated a liberty interest protected by the Fourteenth Amendment by subjecting him to disciplinary sanctions without due process of law.

The Respondent was charged on August 13, 1987 with disobeying administrative rules in connection with his alleged lack of cooperation in a routine strip search procedure required of inmates moving between certain parts of the prison facility. The disciplinary violations for which inmates may be charged, the possible disciplinary sanctions, and the procedures to be followed in disciplinary proceedings are set forth in Hawaii State Prison rules. Petition for Certiorari, at A41-A60. These rules prescribed a maximum

disciplinary sanction of 60 days segregated confinement, which may also be accompanied by the loss of privileges, for "highest misconduct" and a maximum of four hours disciplinary segregation for "low-moderate" misconduct. *Id.* The rules also require that notice and an opportunity to be heard be provided on all types of "serious" charges except when "institutional safety or the good government of the facility would be jeopardized." Pet. App. at A54. At least four hours of segregated confinement is a *possible* sanction for any "serious" charge, but in no instance will a misconduct conviction result in a loss of "good time" or necessarily delay an inmate's release or parole.¹

The Respondent was charged with three disciplinary offenses, one of which was classified as "high" and two as "low-moderate" under the prison rules. Pet. App. at A65-A67. After notice and a hearing held on August 28, 1987, he was convicted of all three charges, and sanctioned by 30 days in segregated confinement. *Id.* The high misconduct conviction was later expunged under the discretionary internal review procedures established by §17-201-20 of the prison rules, and the sanctions finally imposed were limited to one four-hour period of segregated confinement for each of the two low-moderate misconduct charges, to be served consecutively. *Id.* The Respondent actually spent 30 days in segregated confinement, however, before the adjustment was made.

¹Under Hawaii law, inmates do not earn or receive "good time." Inmate behavior is one of several factors which may be considered by the parole authority, but no statute or regulation mandates a presumption or other connection between parole decisions and an inmate's disciplinary record. Haw. Rev. Stat. §353-68 and §353-69. An inmate with numerous disciplinary sanctions may be granted parole. An inmate with no discipline sanctions may be refused parole.

Despite the relatively modest nature of the Respondent's "loss," he commenced a federal court action alleging he had been deprived of a constitutionally protected due process right to call witnesses at the disciplinary hearing. Although the Respondent pleaded "not guilty" to the disciplinary charges, the record below reveals no material facts which were in dispute at the prison hearing.

The U.S. District Court granted summary judgment for the Petitioner and other State defendants. Pet. App. at A21-39. The Court of Appeals, in a decision reported as *Connor v. Sakai*, 15 F.3d 1463 (9th Cir. 1994), concluded that the portion of the state prison regulations which directed prison hearing officers to find the inmate guilty if he admitted guilt or if there was "substantial evidence" of guilt, created a liberty interest in "remaining free of disciplinary segregation" by substantially fettering official discretion within the meaning of *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), and remanded the case.

This certiorari proceeding followed.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision oversimplifies and distorts the governing case law on the liberty interests of convicted prisoners by concluding that Hawaii law created a liberty interest solely because prison regulations prescribed guidelines to prison hearing officers concerning the standard of proof applicable to inmate disciplinary hearings. No consideration was given to the fact that the prison regulations did not limit the discretion of prison officials to employ segregated confinement as an administrative or disciplinary measure. Moreover, the application of a particular standard of proof is a procedural, not a substantive right, and is

relevant only where a State has already provided the inmate with the more basic due process right to be heard.

A liberty interest analysis is used to determine whether due process attaches to some substantive right of an individual, and, if so, what process is due before the government may act to deprive the individual of that interest. To conclude that a State has created a substantive liberty interest in avoiding segregated confinement merely because the State has elected, as a matter of sound prison management, to provide inmates with certain procedural due process protections in all nontrivial disciplinary proceedings impermissibly puts the cart before the horse; such a result is logically and practically flawed. See *Hewitt v. Helms*, 459 U.S. 460, 471 (1985).

The instant case presents an appropriate opportunity for the Court to reexamine the validity of the State-created liberty interest doctrine insofar as it applies to matters encountered by prison inmates in the ordinary course of prison confinement. The present "specific substantive predicate/explicit mandatory language" standard, most recently applied in *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), depends entirely upon the phrasing of State regulations and thereby creates arbitrary and artificial results. It should be replaced by a "real substance" or "inherent interest" standard in which State law is relevant only to the extent it creates a substantive right to actual release from confinement warranting protection as an inherent liberty interest under the Due Process Clause, such as a right to early release based on earned good time, or a right to parole based upon meeting specific eligibility standards. The proposed standard would have no effect upon the right of inmates to present *substantive* claims based upon

the Eighth Amendment or other provisions of the Constitution.

Nothing about Hawaii's prison rules or the action taken by the prison administration in the instant case implicates the duration of the inmate's sentence. Continued focus on the phrasing of State prison regulations promises to encourage the filing of federal court actions seeking routine appellate-type review of routine actions by State prison administrators, and to embroil federal trial courts in unresolved state law issues. See, e.g., the debate between the majority and the two dissenting opinions in *Sultenfuss v. Snow*, 35 F.3d 1494 (11th Cir. 1994) (*en banc*).

ARGUMENT

I. HAWAII'S STATE PRISON REGULATIONS CREATE NO LIBERTY INTEREST IN FREEDOM FROM SEGREGATED CONFINEMENT:

In three decisions issued in 1983 and 1989, the Court formulated the standard for determining whether regulations governing the administration of State prisons constitute a State-created liberty interest protected by the Due Process Clause of the Fifth Amendment and the Fourteenth Amendment. *Hewitt v. Helms*, 459 U.S. 460 (1985)(administrative segregation); *Olim v. Wakinekona*, 461 U.S. 238 (1983)(administrative inter-state transfer); *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989)(denial of individual visitors). This standard, hereafter referred to as the "*Hewitt/Thompson*" test, recognizes a protected liberty interest only if a State has acted to limit the discretion of prison officials by establishing substantive requirements or predicates which are "particularized,"

"objective," and "defined," *Olim*, 461 U.S. at 249; and which are also "explicitly mandatory." *Thompson*, 490 U.S. at 463; *Hewitt*, 459 U.S. at 471-472.

The mandatory nature of the limitations prescribed by a rule is critical. Only prison regulations which create a reasonable expectation that they can be enforced against prison officials will support a liberty interest claim. *Kentucky Department of Corrections v. Thompson*, 490 U.S. at 465. The entire concept of liberty interest is grounded upon a "legitimate claim of entitlement," *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), to a substantive benefit or privilege which has a real and substantial nature. *Wolff v. McDonnell*, 418 U.S. 539, 557. Consequently, prison regulations which advance penological and other State interests by providing guidelines for various administrative functions within the prison system create no liberty interest in the inmates if official decisionmakers retain the discretion to take action or deny relief "for any constitutionally permissible reason or for no reason at all." *Olim v. Wakinekona*, 461 U.S. at 249.

A. The Respondent Had No Enforceable Right In Avoiding Segregated Confinement.

The Hawaii Division of Corrections rules at issue in this case, Haw. Admin. R. Title 17, Subchapter 2, are entitled "The Adjustment Process."² They meet neither

²The Hawaii Adjustment Process rules contain: 1) a list of several inmate "rights and privileges," including the right to "nutritious meals" and "respectful treatment," §17-201-5(a); 2) a list of inmate responsibilities, including obedience to prison rules and treating other persons "respectfully," §17-201-5(b); 3) a list of prohibited acts constituting misconduct and a list of the "sanctions which may be imposed as

part of the two-part *Hewitt/Thompson* test. Of initial significance is the absence of provisions pertaining to segregated confinement from the specific inmate rights and privileges listed in §17-201-5(a). Nor do the rules taken as a whole contain any "specified substantive predicates" or "explicit mandatory directives" which limit the use of segregated confinement *per se* or otherwise compel the conclusion that inmates have been conferred an enforceable right to be free of segregated confinement.

In fact, Subchapter 2 reflects an intention to preserve the administration's discretion to impose whatever disciplinary sanctions may be appropriate on a case-by-case basis. Although the rules are sprinkled with "shalls and wills," "mays" and "shoulds" predominate, especially regarding the imposition of particular disciplinary sanctions for particular offenses. Section 17-201-12 states that serious punishment shall be administered through an unbiased "adjustment committee," and by employing the *procedures* described in §§17-201-13 through 20, but these procedures are frequently qualified and subject to discretionary override by prison officials. For example, §17-201-17(a) limits the right to appear at a disciplinary hearing whenever "institutional safety or the good government of the facility would be jeopardized," and §17-201-17(f) lists exceptions to the right to offer evidence, including relevancy, redundancy, and "any other justifiable reason."

punishment" for the respective offenses, §§17-201-6, 7, 8, 9 and 10; 4) several sections pertaining to the investigation and disposition of misconduct allegations, including hearing and post hearing review procedures, §§17-201-12, 13, 14, 15, 16, 17, 18, and 20; and 5) a description of punishments to which inmates may be subjected, §17-201-19. Pet. App. at A41-A60.

Section 17-201-18 pertains to adjustment committee findings and was the sole source of the "specific substantive predicates" and "explicit mandatory directives" relied upon by the Ninth Circuit, but §17-201-18(b) merely provides:

Upon completion of the hearing, the committee *may* take the matter under advisement and render a decision based upon evidence presented at the hearing to which the individual had an opportunity to respond or any cumulative evidence which may subsequently come to light may be used as a permissible inference of guilt, although disciplinary action shall be based upon more than mere silence. A finding of *guilt* shall be made where:

- (1) The inmate or ward admits the violation or pleads guilty.
- (2) The charge is supported by substantial evidence.

[Emphasis supplied.]

Read literally, this language indicates that the adjustment committee is not required to render a decision, but, if it does, it may consider post-hearing evidence with which the inmate has not been confronted. The only limitation on the committee's discretion contained in §17-201-18(b) is that the committee may not *acquit* if substantial evidence supports conviction.

The Ninth Circuit found an additional limitation by making the unwarranted negative inference that a finding of guilt is permitted *only* if supported by substantial evidence. There is no indication Hawaii state courts would interpret

§17-201-18(b) in this manner, *see Olim v. Wakinekona*, 461 U.S. at 249-250 n.10, and the improbability of such an expansive interpretation is underscored by the recognition that due process is satisfied in a prison setting involving protected liberty interests whenever "some" or "any" evidence supports the administration's decision. *Superintendent v. Hill*, 472 U.S. 445, 455 (1985). In any event, the plain language of §17-201-18 does not support the conclusion that an inmate cannot be placed in segregated confinement if substantial evidence or an admission does not support his guilt.

The Ninth Circuit's interpretation of §17-201-18(b) also conflicts with other portions of the Adjustment Process rules which reveal that prison officials are not limited to specified substantive predicates in making decisions to place, or retain, an inmate in segregated confinement for disciplinary or other reasons, and the administration has reserved to itself the discretion to apply disciplinary sanctions, including segregated confinement, whenever such action would be in the best interest of the institution.³

The Hawaii rules now at issue resemble the Hawaii rules reviewed in *Olim v. Wakinekona*, 461 U.S. at 241-242, and the South Dakota parole rules reviewed in *Dace v. Mickelson*, 816 F.2d 1277 (8th Cir. 1987), both of which required State officials to follow certain procedures and

³These provisions include: §17-201-19(a)(2), which authorizes the imposition of disciplinary segregation for more than sixty days with the administrator's approval; §17-201-19(b), which authorizes the adjustment committee to refer cases to the program committee for further action; §17-201-20(b), which authorizes the administrator to "initiate review of any adjustment committee decision and ... modify any findings or decisions;" and §17-201-14, which authorizes prehearing segregation for "the security or good government of the facility" or "for any other good reasons."

weigh certain factors, but created no protected liberty interest because the ultimate substantive decisions were reserved to the discretion of the final decisionmaker.

If a ... regulation only mandates that the state officials follow certain procedures or take into account certain factors, but specifically provides that the prisoner's release is nevertheless discretionary with the board, as evidenced by the use of discretionary language, then no protected liberty interest has been created.

Dace v. Mickelson, 816 F.2d at 1280, citing *Hewitt v. Helms*, 459 U.S. 460 (1983) and *Greenholtz v. Nebraska Inmates*, 442 U.S. 1 (1979).⁴

Sections 17-201-19, 20 and 14 of the Adjustment Process rules, respectively, preserve the ultimate decisionmaker's discretion to impose or remit disciplinary sanctions without providing a full adjustment committee hearing, without following the recommendations of the adjustment committee, or without regard to the presence of "substantial evidence." Under such circumstances, any restrictions which §17-201-18 may impose upon the initial recommendations of the adjustment committee are not relevant, *Olim v. Wakinekona*, 461 U.S. at 249-250, and the

⁴See also *Moody v. Daggett*, 429 U.S. 78, 88 n. 9 (1976), which held that federal inmates have no statutory or constitutional entitlement sufficient to invoke due process in prisoner classification or rehabilitative programs established under federal regulations because 18 U.S.C. 4081 confers upon prison officials full discretion to control these conditions of confinement.

Adjustment Process rules lack the explicitly mandatory substantive predicates necessary to create a liberty interest.⁵

B. The Ninth Circuit Improperly Extended The *Hewitt/Thompson* Analysis To Mere Procedural Rights.

Even if the absence of substantial evidence were a basis for avoiding prison disciplinary sanctions under Hawaii law,⁶ it does not follow that the presence of this particular

⁵Imagining how any State prison regulations which lack a clear State law remedy for enforcement of alleged "specific substantive predicates," can be viewed as imposing an "explicitly mandatory" limitation on the "discretion of State prison administrators," is difficult. The *Hewitt/Thompson* standard at least implies that a State court remedy is necessary to establish the presence of any State-law liberty interest claimed by prison inmates, and the rules presently before the Court lack such a remedy.

⁶Although the Court declined to review the second and third issues stated in the Petition for Certiorari, the Ninth Circuit's conclusion that the Petitioner's discretionary decision to deny the Respondent's request to call witnesses was not entitled to qualified immunity appears erroneous on its face. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), protects a state employee from personal liability where the very procedural regulations which invest her with discretion to exclude witnesses at prison disciplinary hearings are subsequently construed by an appellate court to establish a liberty interest. Nothing in the record below establishes that Ms. Sandin was not following the prison guidelines in good faith or reasonably knew the Respondent was constitutionally entitled to call witnesses at the August 28, 1987 disciplinary hearing to a greater extent than was allowed by §17-201-16(f)(2) of the State Prison rules. See *Wolff v. McDonnell*, 418 U.S. at 566 (inmate's right to call witness may be limited if it would jeopardize institutional safety or correctional goals), and at 582 (the right to call witnesses is qualified and defers "to the discretion of prison officials to the extent that the right recognized . . . is practically unenforceable.") Marshall, J., dissenting). See also *Codd v. Velger*, 429 U.S. 624 (1977), where the Court stated, at 627: ". . . if the hearing mandated by the Due

limit on administrative discretion should automatically create a liberty interest which vests all prison disciplinary hearings with all of the due process rights prescribed by *Wolff v. McDonnell*, 418 U.S. at 558-557.

The "substantial evidence" requirement of Adjustment Process Rule §17-201-18(b)(2) is not a true "substantive predicate" or "substantive standard" within the meaning of the *Hewitt/Thompson* test. "Substantial evidence" merely describes a standard of proof. As such, it is a procedural, not a substantive, concept. See *Superintendent v. Hill*, 472 U.S. at 447, a case where the issue addressed was whether due process required the application of the "substantial evidence" or the "some evidence" standard of proof.

A standard of proof appears in Hawaii's Adjustment Process rules as an administrative tool to guide the conduct of the State employees who serve on adjustment committees, not to create a substantive right for inmates to avoid disciplinary segregation or even to have their disciplinary decisions reviewed on a substantial evidence basis. "It is error to attribute significance to the fact that the prison regulations require a particular kind of hearing before the Administrator can exercise his unfettered discretion," *Olim v. Wakinekona*, 461 U.S. at 250. In *Hewitt v. Helms*, 459 U.S. at 471, the Court also stated that the adoption of procedural guidelines, without more, suggests that a State has chosen to apply only the specified protections and not all the procedural rights which might be required by the Fourteenth Amendment. Stated more directly, "[p]romises

Process Clause is to serve any useful purpose, there must be some factual dispute . . . which has some significant bearing on the [matter in controversy]." No assertion has been made that the Petitioner interfered with the application of the substantial evidence standard to determine the misconduct allegations against the Respondent.

of particular procedures do not create legitimate claims of entitlement." *Wallace v. Robinson*, 940 F.2d 243, 248 (7th Cir. 1991)(*en banc*), *cert. denied*, 112 S. Ct. 1563 (1992)(holding that prison disciplinary procedures established no liberty interest in inmate's job assignment).

All mandatory language in prison regulations does not create a liberty interest, and the Court has cautioned that courts should not "search regulations for any imperative that might be found," but confine themselves to "relevant mandatory language that expressly requires" the application of substantive predicates.⁷ *Thompson*, 490 U.S. at 464, n. 4. The Ninth Circuit itself has previously recognized that guidelines for corrections officers do not create entitlements for inmates, *Baumann v. Arizona Department of Corrections*, 754 F.2d 841, 844 (9th Cir. 1985), but the decision below strays from the path laid out in *Thompson* by artificially seeking out and relying upon a minimally relevant procedural mandate — that the adjustment committee find inmates guilty if there is substantial evidence of their guilt.

The Hawaii Adjustment Process rules do not expressly require the application of substantive predicates for the reasons expressed by the decision in *Miller v. Henman*, 804 F.2d 421 (7th Cir. 1986), *reh'g denied* 815 F.2d 37 (1987), *cert. denied* 484 U.S. 844 (1987), a "*Bivens*" action⁸

⁷The wisdom of focusing on substantive rights is supported, among other things, by the fact that procedural mandates are generally accompanied by authority for waiving irregularities which do not materially affect the result reached, even in situations where significant substantive rights are at risk. See *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1717-1718 (1993); *Chapman v. California*, 386 U.S. 18, 22 (1967); 28 U.S.C. §2111; Fed. R. of Civ. Pro. 61; Fed. R. Crim. Pro. 52 (a).

⁸*Bivens v. Six Unnamed Agents*, 403 U.S. 388 (1971), provides a cause of action analogous to 42 U.S.C. §1983 against federal officials.

brought by a federal inmate placed in segregated confinement without a due process hearing. In that case, the court of appeals held that the relatively detailed federal regulations created no liberty interest, because the Attorney General had merely:

. . . told his staff how he wants to exercise his discretion -- language that brings his subordinates' acts in line with his wishes but does not reduce his discretion to do otherwise. . . . Whether we call the pronouncements "internal personnel manuals" or "precatory" or something else, they remain statements of the way in which discretion is exercised but do not establish substantive rights. [Citations omitted.] And because the liberty and property of a prisoner are defined by the substantive rules of positive law, the absence of such rules is dispositive.

* * * * *

The documents guide the staff rather than the prisoners. . . . *A jailer who gives erratic and unreliable classifications may have to answer to the Attorney General, but he does not have to answer to Miller.*

Miller v. Henman, 804 F.2d at 424, 427. [Emphasis supplied.].

"A liberty interest is . . . a substantive interest of an individual; it cannot be the right to demand needless formality. Process is not an end in itself." *Olim v. Wakinekona*, 461 U.S. at 250. The Respondent, however, is claiming a liberty interest in avoiding segregated

confinement simply because it was imposed as a disciplinary sanction, and despite his routine exposure to segregated confinement for nondisciplinary reasons. The instant case thus illustrates the tendency to trivialization which results from grounding the existence of a substantive liberty interest on a State's grant of selected procedural rights. If the *Hewitt/Thompson* test can be satisfied by mandating the use of some procedural protections, no matter how minor, in conducting inmate disciplinary proceedings or other activities associated with the daily operation of a prison system, then procedural challenges to hundreds of routine actions by prison administrators will be converted into civil rights violations redressable in the federal courts under 42 U.S.C. §1983.

II. INMATE DISCIPLINE, AND OTHER CORRECT- IONAL ACTIVITIES WHICH DO NOT DIRECTLY IMPACT UPON TIME SERVED SHOULD BE EXCLUDED FROM LIBERTY INTEREST PROTECTION.

Except for *Hewitt v. Helms*, no decision of the Court has recognized a protected liberty interest of prison inmates in a right or privilege which did not directly relate to the fundamental interest of release from confinement, or, in the case of *Vitek v. Jones*, 445 U.S. 480 (1980), confinement in an entirely different type of institution.⁹ The Amici States

⁹See also *Wright v. Enomoto*, 462 F. Supp. 397 (N.D. Cal. 1976), summarily *aff'd*, 434 U.S. 1052 (1978), where the opinion of the three judge district court found a liberty interest in avoiding administrative segregation based upon California prison regulations pertaining to both administrative and disciplinary segregation, and included dicta, at 402, suggesting that any transfer "to the grossly more onerous conditions of

ask the Court to revisit *Hewitt v. Helms* and hold that the only liberty interest which survives conviction and enjoys protection under the Due Process Clause is the inmate's inherent interest in release from the prison environment. Under this test, State laws necessarily remain relevant, but only to the extent they create clear substantive inmate rights which directly affect actual release from confinement, because only release from confinement is sufficiently important to be categorized as an inherent right derived directly from the Due Process Clause.

Adoption of this bright line standard would eliminate a sizable number of 42 U.S.C. §1983 claims based upon due process violations associated with alleged liberty interests in ordinary conditions of prison confinement, and would refocus judicial inquiry upon first principles enunciated by the Constitution. It would also encourage uniform results, comity with State courts, and reform and experimentation in State prison systems.

Meachum v. Fano, 427 U.S. at 224, rejected an inmate's claim that "any change in the conditions of confinement having a substantial adverse impact on the prisoner is sufficient to invoke the [inherent] protections of the Due Process Clause." [Emphasis in original.] In *Kentucky Department of Corrections v. Thompson*, a group of Amici States requested the Court to establish a bright line test that excluded the daily operational decisions of State prisons which did not affect the duration or very nature of confinement from the scope of State-created liberty interests, regardless of the content of state prison regulations addressing such activities. The Court held that Kentucky

maximum security* would be inherently protected by the Due Process Clause.

had created no liberty interest in receiving individual visitors, but stated that it was expressing no view on the Amici States' proposal, would leave its resolution "for another day." *Id.*, 490 U.S. at 461-462, n.3. The instant case affords the Court an appropriate opportunity to determine whether any change in an inmate's conditions of confinement which may be regulated by State prison rules is protected by the Due Process Clause.¹⁰

A. The *Hewitt/Thompson* Rule Has Proven Cumbersome and Unpredictable.

The statutes and regulations governing good time at issue in *Wolff v. McDonnell*, clearly conferred upon inmates specific substantive rights in the retention of earned good time, 418 U.S. at 545-553, and good time can have a direct effect on the date of the inmate's release from confinement. Early release was, the Court indicated, an underlying interest of "real substance" to which procedural due process should attach. *Id.*, at 557; *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972)(conditional freedom on parole is a valuable and very different condition than confinement in prison which includes many core values of unqualified liberty).

¹⁰The Court has also advised that the procedural standards articulated in *Wolff v. McDonnell*, are not "graven in stone," and might appropriately be revised "as the nature of the prison disciplinary process changes." 418 U.S. at 571-572. During the past twenty years, correctional institutions have changed notably, not only in size, *see* note 16, *infra*, but by implementing professional management efforts which have brought improved physical facilities, greatly increased access to law libraries and legal assistance, and the voluntary establishment of procedural protections for inmates.

Since *Wolff*, however, the Court's opinions in conditions of confinement cases have included language which encourages a far broader view of inmate liberty interests that turns entirely upon the phraseology employed in State prison regulations or inmate handbooks. The 1983 decision in *Olim v. Wakinekona* coined a phrase which shifted the focus from specific substantive rights granted to inmates to specific restrictions applicable to prison officials. The Court stated that prison regulations could constitute a State-created liberty interest if they "plac[ed] substantive limitations on official discretion," *id.*, 461 U.S. at 249, and in the contemporaneous case of *Hewitt v. Helms*, 459 U.S. at 470-471, the Court actually held that Pennsylvania prison regulations pertaining to the administrative segregation of inmates imposed sufficient substantive limitations upon official discretion to create a liberty interest.¹¹ Finally, the 1989 *Kentucky Department of Corrections v. Thompson* decision explained the State-created liberty interest theory as follows:

¹¹The *Hewitt* decision refers to Pennsylvania "statutes and regulations," *e.g.*, 459 U.S. at 470, but only regulations are cited in the opinion. Extra scrutiny seems warranted when, as in the instant case, prison rules are alleged to be the sole source of a State-created liberty interest. State corrections departments, like other state and federal agencies, may adopt rules which create substantive rights or duties only if the particular benefits or obligations created are authorized by the agency's enabling statute. The enabling statute establishes the framework and the agency rules merely fill in the details. *See, e.g., Sullivan v. Zerbley*, 493 U.S. 521, 528 (1990) (rules which exceed an agency's statutory authority are invalid). *See also Panama Refining Co. v. Ryan*, 293 U.S. 388, 428-429, 432-433 (1935) (agency rules must be subordinate to and found within a discernable framework of delegated legislative authority).

The fact that certain state-created liberty interests have been found to be entitled to due process protection, while others have not, is not the result of this Court's judgment as to what interests are more significant than others; rather, our method of inquiry in these cases always has been to examine closely the language of the relevant statutes and regulations. 490 U.S. at 461.

This rationale varies from the Court's *Greenholtz* opinion, 442 U.S. at 7, which quoted *Board of Regents v. Roth*, 408 U.S. at 570-571, for the proposition that the existence of a liberty interest was determined by looking "not to the 'weight,' but to the nature of the interest at stake." Moreover, by purporting to be subject matter or value neutral, the *Hewitt/Thompson* test reduces the grand concept of inherent human rights into an elaborate search for details of statutory construction in hopes of determining whether particular language in prison regulations can be better categorized as mandatory or permissive, or as substantive or procedural. The door has been opened to procedural due process claims based upon minor details of State prison operations whenever there is a plausible suggestion of mandate in the applicable State law.

Disregarding the real substance of an inmate's alleged post-conviction liberty interest also introduces an element of unpredictability into the law which encourages frivolous inmate suits and generates inconsistent lower court decisions concerning the constitutional significance of routine correctional activities which are engaged in by all State and federal prisons.

The depth of division in court of appeals decisions involving inmate discipline and conditions of confinement is illustrated by the irreconcilable approaches taken by the Second and the Seventh Circuits in evaluating the significance of written rules governing prison discipline rules. Compare, e.g., *Walker v. Bates*, 23 F.2d 652, 656 (2d Cir. 1994), cert. pending sub nom *Bates v. Walker*, No. 94-158, which cites ten years of Second Circuit precedent holding that possible restrictive confinement imposed as a disciplinary sanction impairs a liberty interest protected by State law, with *Wallace v. Robinson*, 940 F.2d at 247-249, which holds that as long as an inmate's job assignment (or other condition of confinement) may be changed or terminated for "any reason," he cannot complain if such a change is actually made because of a procedurally deficient disciplinary action.

The unpredictability of the current State-created interest test, even in decisions by the same circuit, is demonstrated by the divergent results reached in the Ninth Circuit's opinions in the instant case and its 1985 decision in *Bauman v. Arizona Department of Corrections*, 754 F.2d 841, and by the majority and minority opinions in the Eleventh Circuit's recent *en banc* decision holding, by a six to five vote, that the new Georgia parole statute does not create a protected liberty interest. *Sultenfuss v. Snow*, 35 F.3d 1494.¹² The majority in *Sultenfuss* recognized that the mandatory language in the Georgia statute merely dictated what criteria should be considered, not that the inmate is entitled to a particular result if those criteria are met. The

¹²Judge Carnes filed a separate dissent disagreeing with both the majority and the other dissenters for not certifying State law questions concerning the discretion available to Georgia parole officials under the new statute to the Georgia Supreme Court.

dissenting judges sound the very note of irony recognized by Chief Justice Rehnquist in *Hewitt*, 459 U.S. at 471, by asserting that Georgia would not have bothered to include criteria in its parole statute had it not intended to impose substantive predicates upon someone.¹³

Subjecting details of daily prison life to federal court review under 42 U.S.C. §1983 penalizes legitimate state efforts to achieve a manageable and rehabilitative prison environment, and erodes federalism by offering a federal court remedy to anyone who claims to have been deprived of a benefit conferred by State law. Moreover, because the "mandatory outcome" required by the *Hewitt/Thompson* test is defined by State law, often including case law, continued use of the *Hewitt/Thompson* State-created law test interjects a federal court presence in matters traditionally viewed as prerogatives of the States. See note, 13, *supra*. Compare *Olim v. Wakinekona*, 461 U.S. at 259, n. 10 (Marshall, J., dissenting) with *Id.*, at 250, n. 10 (majority opinion). Issues such as the availability of State administrative procedure act, tort claims act, certiorari or other remedies are best decided by State courts, as are interpretations of parole and good time statutes necessary to determine their mandatory nature and practical effect upon a particular inmate.¹⁴

¹³The more constitutionally sound response to the contention that guidelines directed to State officials are usually expected to be followed, is that, given the limited nature of post-conviction liberty interests, such "substantive limitations on official discretion" do not necessarily vest the inmate with enforceable rights. Compare *Miller v. Henman*, 804 F.2d at 427 with *Hewitt v. Helms*, 459 U.S. at 471-472.

¹⁴Good time programs do not necessarily create protected liberty interests in all situations, see *Superintendent v. Hill*, 472 U.S. at 453, and the distinguishing factors may involve considerations other than the presence of mandatory language in the statute and implementing

B. The State-Created Liberty Interest Standard May Be Appropriately Reevaluated In The Limited Context of Daily Prison Operations.

The opportunity to ease "the problems in judicial administration caused by the surfeit of meritless *in forma pauperis* complaints in the federal courts" recognized in *Neitzke v. Williams*, 490 U.S. 319, 325 (1989), would alone justify the articulation of a bright line rule applicable to liberty interests in conditions of prison confinement,¹⁵ but such a rule would also recognize the States' substantial interest in prison administration and in interpreting their own laws, as well as providing a clearer analytical basis for evaluating post-conviction liberty.

An inmate is confined to a prison system as a result of criminal conviction and sentencing procedures which require that procedural due process be carefully observed. Once duly imposed, however, a prison sentence necessarily involves a major reduction in the convicted person's constitutionally protected liberty interests. The decisions of

regulations. For example, N.H. RSA 651-A:22, IV(c), provides for the discretionary return of good time by prison officials, and measured amounts of good time lost through disciplinary sanctions are routinely restored to inmates each month upon their continued good behavior and submission of a request to the warden or Commissioner of Corrections. Consequently, the loss of ten days good time early in a ten year minimum sentence would not affect the inmate's actual release date or eligibility for parole, and would be an entirely speculative basis for concluding that a liberty interest had been impaired.

¹⁵The respondent's claim that he was unreasonably deprived of the right to call witnesses is an example of such a case. Many 42 U.S.C. §1983 claims seek nothing more than routine sufficiency of the evidence review of disciplinary actions which have, in fact, resulted in the imposition of only minor or probationary disciplinary sanctions.

the Court have uniformly recognized this basic principle, e.g., *Wolff v. McDonnell*, 418 U.S. at 557; *Bell v. Wolfish*, 441 U.S. 520, 546 (1979), and conditions of confinement which are "within the sentence imposed" upon an inmate "and not otherwise violative of the Constitution" are not entitled to *inherent* protection under the Due Process Clause. *Montanye v. Haymes*, 427 U.S. 236, 242 (1976).

The day-to-day activities of State and federal prisons systems include intrastate and interstate transfers, classifications, administrative and disciplinary segregation, discipline and grievance systems, mail privileges, visitor privileges, organizations, library privileges, education opportunities, vocational training, job assignments, work-release, commissary privileges, and hobby, recreation and leisure time activities. None of these activities are *inherent* liberty interests, and the Court has held that confinement to more restricted quarters is a far less significant change in a prisoner's freedoms than becoming eligible for parole retaining or good-time credits, which have also been held to create no inherent liberty interest. *Hewitt v. Helms*, 459 U.S. at 468.

Promulgation of written regulations governing the performance of daily prison operations, including guidelines for disciplinary action against inmates, is a widely employed technique for managing the nation's growing prison population, and is, "in the view of many experts in the field, a salutary development." *Hewitt v. Helms*, 459 U.S. at 471.¹⁶ Written regulations serve a number of valid

¹⁶Since that observation was made, State and federal prison populations have grown dramatically, raising from a combined total of 436,855 on December 31, 1983 to 1,012,851 on June 30, 1994. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, press release dated October 27, 1994, and "Prisoners in 1993," Washington,

penological needs, as well as broader State interests such as personnel management, risk management and purchasing objectives, which require that they be written in direct, mandatory language. Vague, highly complex, or contradictory, regulations would leave correctional officers without meaningful assistance in making the quick judgments so often required of them in the daily operation of State prisons. Yet, only imprecise rules allow a State to defend itself against federal court actions brought by inmates seeking due process review of prison disciplinary actions and other routine administrative actions affecting the day-to-day activities of prison life.¹⁷

There are persuasive reasons for applying a different liberty interest rule when evaluating regulations governing the administration of prison systems than when evaluating other areas of State law.

D.C. June 1994. Of the 919,143 present State prison inmates, slightly more than 50% are likely to be the subject of disciplinary actions during their current sentence, over 90% of those charged with disciplinary infractions will be found guilty, and segregated confinement will be the most frequent form of sanction imposed. *Id.*, and U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Prison Rule Violators," Washington, D.C., December 1989.

¹⁷The *Sultenfuss* decision reveals the tension which the *Hewitt/Thompson* test places on ordinary principles of statutory construction by discouraging clear, directive language. The States are faced with a drafting dilemma. Even a statute which expressly states that no liberty interest is being created, may be differently construed by the federal courts in deciding Due Process Clause claims. On the other hand, state courts may find a statute which provides that specific requirements imposed upon state officials are merely advisory is insufficiently clear to warrant enforcement against a state official charged with misfeasance.

The deprivations imposed in the course of the daily operations of an institution are likely to be minor when compared to the release from custody at issue in parole decisions and good-time credits. Moreover, the safe and efficient operation of a prison on a day-to-day basis has traditionally been entrusted to the expertise of prison officials, *see Meachum v. Fano*, 427 U.S. at 225. These facts suggest that regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to "liberty," different from statutes and regulations in other areas.

Hewitt v. Helms, 459 U.S. at 470.

A bright line approach to liberty interests which eliminates the current form of the State-created interest test would also reduce the need for close federal interpretations of State law of the type described in *Olim v. Wakinekona*, 461 U.S. at 259 n.13 (Justice Marshall, dissenting), and the resulting intrusion upon State sovereignty. *See generally Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984); *Atascadero State Hospital and California Department of Mental Health v. Scanlon*, 473 U.S. 234, 238 n.2 (1985).

"The Fourteenth Amendment did not alter the basic relations between the States and the national government," *Screws v. United States*, 325 U.S. 91, 109 (1945), and infringement of State sovereignty was a factor influencing the Court's decision to apply a different standard of review for constitutional error claims brought in habeas corpus

proceedings than to claims presented on direct review. *Brecht v. Abrahamson*, 113 S. Ct. at 1721.

No apparent reason exists for subjecting the area of State prison operations to greater federal scrutiny than other State actions which might result in unfairness or discomfort to individual citizens. The Court has stated that it "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual states," and will not do so unless the State's action "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 201-202 (1977).

Moving the inquiry towards the nature of the inmate's substantive right and away from the structure of the State's implementing regulations, would be fully consistent with the Court's prior observations that: 1) running a prison is a uniquely difficult job which warrants deference to the judgment of prison officials. *E.g.*, *Hewitt v. Helms*, 459 U.S. at 467; *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); 2) courts are "ill-equipped to deal with the increasingly urgent problems of prison administration and reform," *Procunier v. Martinez*, 416 U.S. 396, 405 (1974); and 3) "limitations on the exercise of [an inmate's] constitutional rights arise both from the fact of incarceration and from valid penological objectives -- including deterrence of crime, rehabilitation of prisoners and institutional security." *O'Lone v. Shabazz*, 482 U.S. 342, 348 (1987).

State efforts to regulate conditions of confinement should not create a liberty interest for prison inmates, even if the withdrawal or limitation of similar State-created rights or privileges might be sufficient to create such an interest in a different setting. In *Paul v. Davis*, 424 U.S. 693, 710-711 (1976), the Court recognized that a variety of liberty and

property interests have attained constitutional status because they have been initially recognized and protected by State law. Because the traditional common law origins of most of these property and liberty interests are absent in the unique setting of post-conviction prison confinement, the revised standard proposed by the Amici States for applying due process protections to changes in conditions of inmate confinement would have no necessary effect upon the recognition of liberty interests in rights and privileges held by other citizens.

C. The Revised Liberty Interest Standard Proposed By The Amici States Would Not Materially Alter Existing Inmate Rights.

Under the "real substance" or "inherent interest" test proposed by the Amici States, a State law entitlement to release or potential release from the prison environment, whether through good time or parole, or to continued conditional freedom in the form of parole as in *Morrissey v. Brewster*, 408 U.S. 471 (1971), would remain protected. There is an intrinsic difference, however, between the inmate interest in sentence duration or early release protected in the State law cases of *Wolff v. McDonnell*, 418 U.S. 539 (1974), *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979), and *Board of Pardons v. Allen*, 482 U.S. 369 (1987), with its potential for complete release from the prison environment, and the interest in avoiding changes within that environment.¹⁸ This distinction was recognized in *Hewitt v.*

¹⁸*Baxter v. Palmigiano*, 425 U.S. 308 (1976), resolved issues pertaining to the due process protections required in prison disciplinary actions. The recited facts do not reveal whether the *Baxter* inmates were subject to disciplinary sanctions other than segregated confinement, but the

Helms itself, despite the fact that a State-created liberty interest was found to be present. 459 U.S. at 468.

The revised standard proposed by the Amici States would preserve the results reached in the good time and parole line of cases. What would be altered is the concept that a State regulation or statute pertaining to prison discipline, or to any other aspect of daily prison operation, which might reasonably be perceived as a "loss" to an inmate, but which actually affects only conditions of confinement within the scope of the inmate's sentence, could create a protected liberty interest. Under the proposed standard, inmates such as the Respondent would no longer have a colorable claim of due process violation based on changes in conditions of confinement and the wording of State regulations. In most instances, however, including the instant case, State prisons routinely provide brief hearings and other due process protections to disciplinary actions based on prison rule infractions, and to various nondisciplinary changes in conditions of confinement as well.

Moreover, the degree of due process protection which is warranted by changes in conditions of confinement may be minimal. This was, in fact, the case in *Hewitt v. Helms*, where the Court held that the administratively segregated

Court stated that the decision was limited to allegations of "serious misconduct" like those at issue in *Wolff v. McDonnell*, where loss of good time was at stake, and did not extend to all actions in which inmates might be deprived of privileges. 425 U.S. at 323-324. The lower court in *Wright* interpreted the holding in *Baxter* somewhat differently, however, stating that it dealt with the "[deprivation] of significant privileges or [confinement] in maximum security for disciplinary reasons." 462 F. Supp. at 403. [Emphasis supplied.] The summary affirmance of *Wright* remains the only instance in which the Court has held that an inmate had a liberty interest in the subject matter of a prison disciplinary action not involving a loss of good time.

inmates in Pennsylvania satisfied due process." 459 U.S. at 477. Consequently, the primary effect of the proposed "real substance" test would be to eliminate the opportunity for inmates to seek federal court review of administrative actions taken by State prisons on routine due process grounds such as the sufficiency of the evidence or, as in the instant case, the reasonableness of the refusal of live witnesses.

Loss of this opportunity would by no means leave prison inmates without meaningful constitutional rights or adequate redress for injuries of real substance. Their rights to assert substantive, as opposed to due process, 42 U.S.C. §1983 claims based upon alleged violations of the First and Eighth Amendments and the Equal Protection Clause, would be unaffected, as would their right to pursue state law remedies. In addition to internal review procedures, such as those provided by §17-201-20 of the Hawaii "Adjustment Process" regulations, state remedies may include statutory or common law judicial review, such as the certiorari review provided in Massachusetts, see *Superintendent v. Hill*, 472 U.S. at 450-452, the habeas corpus review provided in New Hampshire, see *Baker v. Cunningham*, 128 N.H. 374, 513 A.2d 956 (N.H. 1986)(Souter, J.), and the appellate review conducted under New Jersey Court Rule No. 2:2-3(a)(2) authorizing review of final agency actions. See *Cinque v. Department of Corrections*, 261 N.J. Sup. 242, 618 A.2d 868 (App. Div. 1994).

Provided that they are not otherwise violative of the Constitution, or do not directly affect the duration of the sentence served, an inmate's interest in the conditions of his

¹⁹For this reason, adoption of the proposed "real substance" standard would not, technically speaking, overrule the decision reached in *Hewitt*.

or her confinement are unremarkable. Unremarkable State-created rights can, and should, be left to ordinary State remedies.

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit should be reversed, and a revised standard for determining the liberty interests of prison inmates in the conditions of their confinement should be articulated.

Respectfully submitted,

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Supreme Court, U.S.

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OFFICE

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CINDA SANDIN, Unit Team Manager,
Halawa Correctional Facility, Hawaii,

Petitioner,

vs.

DEMONT R. D. CONNER, ET AL.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF AMICUS CURIAE OF THE
EDWIN F. MANDEL LEGAL AID CLINIC
IN SUPPORT OF RESPONDENT**

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U.S. Const. amend. 5	54, 57
U.S. Const. amend. 14	passim

Other Authorities

American Correctional Association, Standards for Adult Correctional Institutions (1981)	5, 35, 47
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Bureau of Justice Statistics, U.S. Dept. of Justice, Prison Rules Violators (Dec. 1989)	40, 45
DiIulio, Administering Discipline in Federal Bureau of Prisons, 3 Federal Prisons Journal 61 (1994)	35
Luise, Note, Solitary Confinement: Legal and Psychological Considerations, 15 N.E. J. on Crim. & Civ. Confinement (1989)	46
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Mushlin, Rights of Prisoners (1993)	44-46
Resource Ctr. on Correctional Law and Legal Services, Am. Bar Ass'n, Comm'n on Correctional Facilities and Services, Survey of Prison Disciplinary Practices and Procedures (1974)	38
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Runda, Rhine & Wetter, The Practice of Parole Boards (1994)	49, 51
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INTEREST OF THE AMICUS CURIAE

Amicus Curiae is the Edwin F. Mandel Legal Aid Clinic, a legal services and clinical education program in Chicago. The Clinic provides services to low income persons and is jointly operated by the University of Chicago Law School and the Legal Aid Bureau of the United Charities of Chicago. The *amicus curiae* files this Brief in support of the position of Respondent DeMont R.D. Conner.

The Clinic provides services to prisoners who are suffering from mental illness or have been found not guilty by reason of insanity. The Clinic also has represented prisoners in establishing that there is a state-created liberty interest in parole in Illinois. The impact of prison discipline including solitary confinement on parole will affect current and future clients of the Clinic.

SUMMARY OF THE ARGUMENT

Hawaii's prison disciplinary regulations limiting the prison's discretion in sentencing an inmate to punitive solitary confinement create a liberty interest under the Fourteenth Amendment's Due Process Clause.

Hawaii prison disciplinary regulations are substantially identical to the statute at issue in *Wolff*. Hawaii provides substantive predicates by listing seventy-three specific offenses, and five catch all categories of any other criminal acts under the Hawaii Penal Code. The disciplinary regulations use mandatory language that a "finding of guilt shall be made where" an inmate is guilty of a specific violations. Further, the regulations require that the prison must follow unmistakably mandatory procedures in determining whether the inmate is guilty of the specific violation charged. Solitary confinement is the most severe punishment the prison can impose only after finding the

inmate guilty of the specific violation. The regulations also set forth substantive predicates for determining the sanction.

Petitioner's interpretation of the regulations to provide unfettered discretion, not constrained by substantive predicates, is an unconstitutional restriction on Hawaii's state created liberty interest. This interpretation violates the Fourteenth Amendment doctrine of the "bitter with the sweet" prohibiting a state from taking away the state created liberty interest by providing inadequate procedures. To interpret the regulations so that the second step of review by the administrator defeats the liberty interest violates this Court's longstanding rejection of the concept that you "must take the bitter with the sweet."

The principle of *stare decisis* requires the retention of the rule recognizing state created liberty interests in freedom from solitary confinement. Numerous decisions have

relied upon and applied the rule the court first announced in *Wolff*. No justification has been shown for overruling this Court's 20 year old precedents recognizing that states can create liberty interests in freedom from disciplinary confinement and loss of goodtime.

None of the "prudential and pragmatic considerations" justify any departure from *stare decisis*. Neither the briefs of Petitioner nor the *amici* in support of Petitioner show that requiring some procedural safeguards attendant to imposition of solitary confinement is unworkable. Also, scholars of prison administration favor procedural safeguards for serious prison disciplinary actions and have demonstrated the salutary effects of procedural fairness on prison peace and safety. Petitioner's concerns regarding the impact on prison discipline are more appropriately addressed in the procedural balancing that occurs under *Mathews v.*

Eldridge, 424 U.S. 319, 335 (1976), after the determination of a liberty interest.

The factual premises concerning the severity of the deprivations caused by solitary confinement remain true today. Solitary confinement is clearly a serious punishment. The American Correctional Association considers disciplinary segregation as a last resort punishment for serious violations, and may "only occur after an impartial hearing has established that there was a serious violation of conduct regulations and that there is no adequate alternative disposition to regulate the inmate's behavior." American Correctional Association, Standards for Adult Correctional Institutions 126 (1981). Further, all parole authorities rely upon prison disciplinary records in parole decisions. It is considered an important factor in deciding parole, and parole agencies must have confidence in the

disciplinary decisions made by prison administrators.

The ability of prison authorities to impose administrative segregation upon inmates does not remove the liberty interest of inmates in avoiding punitive segregation. This Court has held that virtually identical forms of confinement may be classified as punitive or non-punitive based upon the government's intent. When a prison chooses to punish an inmate with solitary confinement for violating prison rules, the Due Process Clause requires it to provide appropriate procedural protections.

ARGUMENT

I. HAWAII PRISON REGULATIONS CREATE A LIBERTY INTEREST BY USING MANDATORY LANGUAGE IN CONNECTION WITH SPECIFIC SUBSTANTIVE PREDICATES.

Nothing has changed in the last twenty years to justify departure from this Court's recognition that placement in solitary confinement can be a state-created liberty interest. Hawaii's statutes and regulations are nearly identical to provisions which this Court has found to create liberty interests. Petitioner and the *amici curiae* in support of Petitioner implicitly concede that to rule in their favor, this Court would have to overrule its precedent. No justification exists for such a drastic curtailment of freedom under the analytic framework of *stare decisis*. The infliction of punitive solitary confinement with its severe restrictions upon the inmate's conditions of confinement, and its collateral consequence of adversely affecting parole, imposes sufficient deprivations to require a

liberty interest under the state-created liberty analysis.

A. This Court's Longstanding Recognition Of A Liberty Interest In Not Being Punished By Solitary Confinement Applies To The Hawaii Prison Regulations.

This Court was right to recognize that states can create liberty interests protected under the due process clause of the Fourteenth Amendment of the U.S. Constitution. The punishment of solitary confinement that the prison officials imposed on DeMont Conner is the exact deprivation that this Court protected by requiring due process in *Wolff v. McDonnell*, 418 U.S. 539 (1974).

Disciplinary solitary confinement of an inmate is the most severe punishment Hawaii imposes on inmates. Because of its severity, solitary confinement cannot be imposed for longer than sixty days without specific additional procedures. While in solitary, an inmate is confined in a small cell for all but six hours per week. In the brief time out of

the cell, the inmate has no contact with other inmates, and is shackled with leg irons and waist chains. Guards strip search inmates upon both leaving and returning to the cell. Almost all possessions are banned, including radios and televisions. Disciplinary segregation also has severe collateral consequences. There is a stigma that comes with punishment, and the guards may brand the inmate a troublemaker and inflict further punishments. Finally, the inmate's years in prison will be longer because parole will likely be delayed.

Hawaii prison disciplinary regulations are substantially identical to the statute at issue in *Wolff*, and meets the requirements for a state created liberty interest by the use of mandatory language in connection with substantive predicates that must be present before an inmate may suffer a serious loss. Hawaii provides substantive predicates by listing seventy-three specific offenses, and

five catch all categories of any other criminal acts under the Hawaii Penal Code. The disciplinary regulations use mandatory language that a "finding of guilt shall be made where" there is substantial evidence an inmate committed a specific violation. The regulations require that the prison must follow unmistakably mandatory procedures in determining whether the inmate is guilty of the specific violation charged. Solitary confinement is one of the punishments the prison can impose only after finding the inmate guilty of the specific violation.

In 1974, this Court in *Wolff v. McDonnell*, 418 U.S. 539 (1974), first announced that the due process clause required that an inmate be afforded procedural protections in prison disciplinary hearings before the inmate could be punished by loss of goodtime credits or placement in solitary confinement. *Wolff* recognized that the state created a liberty interest in remaining free

from solitary confinement, because the state mandated that an inmate must only be punished by placement in solitary confinement after the inmate was found guilty of serious misconduct. *Id* at 558.

The Court has interpreted *Wolff* to require examination of procedural due process questions by first asking whether a liberty interest exists. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted). If a liberty interest exists, then the Court determines what processes are due before the state may deprive the individual of the liberty interest. *Id.* State laws create protected liberty interests in prisons by establishing substantive limitations on official discretion. *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). "The repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has

created a protected liberty interest." *Hewitt v. Helms*, 459 U.S. 460, 472 (1983). The Hawaii regulations governing disciplinary proceedings contain the requisite mandatory language in connection with substantive predicates.

Although this Court did not expressly describe *Wolff* and its progeny in the "mandatory language in connection with substantive predicates" formulation, it was implicit in the decisions. *Thompson*, 490 U.S. at 463. The Court found that the statute created a liberty interest because the statute mandated that inmates "can only lose good-time credits if they are guilty of serious misconduct." *Wolff*, 418 U.S. at 558. Hawaii's disciplinary regulations clearly create a liberty interest under this Court's longstanding test. The regulations use mandatory language that the committee shall find guilt if there is substantial evidence of the offense. Haw. Admin. R. § 17-201-18.

There is also mandatory language used in connection with the procedures required to establish the substantive predicate of the inmate's guilt of "misconduct." Both must be followed before the inmate can be placed in solitary confinement.

B. Hawaii Prison Disciplinary Regulations Contain The Requisite Substantive Predicates To Create A Liberty Interest In An Inmate Not Being Punished By Solitary Confinement.

The Hawaii prison disciplinary regulations contain substantive predicates of specific acts of serious misconduct that may result in punishment of an inmate by solitary confinement. Haw. Admin. R. § 17-201-6(a). The seventy-three substantive predicates of "misconduct" are divided into five categories - greatest, high, moderate, low moderate, and minor - with each category containing a catchall violation of any other criminal act under the Hawaii Penal Code. The regulations provide specific punishments for each category, with a maximum punishment of sixty

days in solitary confinement. Haw. Admin. R. §§ 17-201-6 through 17-201-10. By way of example, the substantive predicates in Haw. Admin. R. § 17-201-6(a) include:

- (1) Sexual assault.
- (2) Killing.
- (3) Assaulting any person . . . causing bodily injury.
- (11) Rioting.
- (15) Any other criminal act which the Hawaii Penal Code classifies as a class A felony.

These specific offenses meet the Court's test of "specified substantive predicates" that must be proven before an inmate is punished. In *Wolff*, the substantive predicates of serious misconduct included "assault, escape, attempt to escape." 418 U.S. at 547. The Hawaii list of offenses contain these three substantive predicates mentioned in *Wolff*: (1) Assault, § 17-201-6(a)(3); (2) Escape, § 17-201-6(a)(3); and (3) Attempting escape, § 17-201-6(a)(3). The

Hawaii regulations also contain a much more detailed listing of the criminal offenses that constitute the substantive predicates.

The substantive predicates in the Hawaii list of offenses are much more "specified" than other substantive predicates this Court has recognized. This Court has found a liberty interest in not being confined in administrative segregation in its summary affirmance in *Enomoto v. Wright*, 434 U.S. 1052 (1978) summarily aff'd, 462 F.Supp 397 (ND Cal. 1976). The substantive predicate was a reasonable belief that the inmate was "a menace to themselves and others or a threat to security." *Wright*, 462 F.Supp at 403. Similarly, in *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 11-12 (1979), the Court recognized the substantive predicate of an inmate's "release would depreciate the seriousness of his crime or promote disrespect for law." The statute required the Board of

Parole to order an inmate's release unless the Board found the substantive predicate.

This Court, in *Vitek v. Jones*, also found that mandatory language in connection with substantive predicates created a liberty interest in an inmate not being involuntarily transferred to a mental hospital. 445 U.S. 480, 489-90 (1980). The substantive predicate required was the finding of a mental illness that could not be adequately treated in the prison. *Id* at 489-90. Similarly, in *Hughes v. Rowe*, this Court recognized that state law prevented an inmate from being placed in segregation unless the substantive predicate of a showing of "institutional security or safety" was proven in a prior hearing. 449 U.S. 5, 12 (1980). The Hawaii list of offenses clearly qualify as substantive predicates under this Court's precedents.

In *Hewitt v. Helms*, 459 U.S. 460 (1983), this Court put to rest any doubts about the mandatory language in connection with

substantive predicates formulation of liberty interests. The substantive predicates of "the need for control" or "the threat of serious disturbance" created a liberty interest. *Id* at 471-72. Finally, in *Board of Pardons v. Allen*, 482 U.S. 369 (1987), this Court held that Montana law mandated an inmate's release on parole when there existed the substantive predicate of a reasonable probability that the inmate could be released without detriment to the inmate or the community.

The substantive predicates of specific offenses in the Hawaii disciplinary regulations are much more certain and specific than those this Court has previously recognized. The cases discussed above require the conclusion that the requisite substantive predicates are present in the Hawaii disciplinary regulations.

C. Hawaii Prison Disciplinary Regulations Create A Liberty Interest By Containing Relevant Mandatory Language In Connection With Specified Substantive Predicates.

For over twenty years, this Court has consistently held that a statute that uses mandatory language in connection with the establishment of specified substantive predicates creates a liberty interest. This Court most recently expressed the mandatory language standard in *Kentucky Dept. of Corrections v. Thompson*: "the use of explicitly mandatory language in connection with the establishment of specified substantive predicates to limit discretion, forces a conclusion that the state has created a liberty interest." 490 U.S. 454, 463 (1989) (citing *Hewitt*, 459 U.S. at 472) (internal quotations omitted).

The Hawaii prison disciplinary regulations contain the required relevant mandatory language. First, the regulations contain the requisite mandatory language in

requiring the adjustment committee to make specific findings. The regulations provide that "disciplinary action shall be based upon more than mere silence." Haw. Admin. R. § 17-201-18(b). Also, "a finding of guilt shall be made where . . . the charge is supported by substantial evidence." *Id.* The Hawaii regulations contain the mandatory language in connection with requiring the substantive predicates before the imposition of punishment by solitary confinement.

Second, the Hawaii disciplinary regulations contain mandatory language requiring that specific procedures must be followed in establishing the substantive predicates. The use of "language of unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed" goes beyond simple procedural guidelines, and creates a protected liberty interest. *Hewitt*, 459 U.S. at 471-72. The Hawaii regulations require that the inmate

shall receive prior written notice of the hearing and the charges against him. Haw. Admin. R. § 17-201-16. The inmate shall have the opportunity to review all relevant non-confidential reports. *Id.* The inmate has a right to appear at the hearing and shall be given an opportunity to respond to and present evidence. Haw. Admin. R. § 17-201-17. The sanctions rendered by the adjustment committee are required to be "commensurate with the gravity of the rule and the severity of the violation." Haw. Admin. R. § 17-201-19(a). The language in the Hawaii disciplinary regulations requiring mandatory procedures is directly relevant to the determination of whether the substantive predicates are present, and create a liberty interest.

Petitioner contends that the Hawaii prison disciplinary regulations only provide procedural protections, and that those alone cannot create a liberty interest. *Pet. Br.* at 43-45. This contention misstates what the

regulations require. The Hawaii prison disciplinary regulations require that if an inmate commits the substantive predicate of "misconduct," defined by a list of specific offenses including sexual assault, killing and rioting, he shall be found guilty. The fact that the regulations also require that the substantive predicate of misconduct be determined by specific procedures, including a specific standard of proof, only further "demands a conclusion that the state has created a liberty interest." *Hewitt*, 459 U.S. at 472. Substantive predicates combined with a burden of proof of substantial evidence create more than an "abstract desire or interest." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982). The specific procedural requirements and the burden of proof requirement in the Hawaii disciplinary regulations give increased content to the fettering of the discretion of the adjustment committee.

Hawaii's disciplinary regulations mandate that the punishment of disciplinary segregation will not occur absent the specified substantive predicate of proof of guilt of the offense by substantial evidence after following mandatory procedures. This is identical to this Court's characterization of the state regulations in *Hewitt*. The regulation at issue in *Hewitt* provided that "[a]n inmate may be temporarily confined to [administrative segregation] . . . where it has been determined that there is a threat of a serious disturbance, or a serious threat to the individual or others." *Hewitt*, 459 U.S. at 471. The Court characterized the statute as having used mandatory language that certain procedures shall be followed and that administrative segregation will not occur absent the substantive predicate of the threat of serious disturbance. The Hawaii disciplinary regulations clearly create a

protected liberty interest under the test this Court has applied for over twenty years.

D. The Administrator Does Not Have Unfettered Discretion, And Even If He Did, The Unfettered Discretion Would Violate Due Process.

Petitioner argues that the facility administrator has unfettered discretion to modify or overturn a disciplinary decision of the adjustment committee. Petitioner's interpretation of the regulations to provide unfettered discretion, not constrained by substantive predicates, is an unconstitutional restriction on Hawaii's state created liberty interest. This interpretation violates the Fourteenth Amendment doctrine of the "bitter with the sweet" prohibiting a state from taking away the state created liberty interest by providing inadequate procedures. In order to avoid this constitutional violation, the regulations should be given the better construction that the administrator's discretion on review is controlled by the substantive predicates and mandatory

procedures set out in the regulations to establish guilt and render sanctions.

To interpret the regulations so that the second step of review by the administrator defeats the liberty interest violates this Court's longstanding rejection of the concept that you "must take the bitter with the sweet." See *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). After state law is analyzed and a liberty interest is found, the minimum procedural requirements are a matter of federal law, and "are not diminished by the fact that the State may have specified its own procedures that it may deem adequate" *Vitek v. Jones*, 445 U.S. 480, 491 (1980). To interpret the regulations to provide the Administrator unfettered discretion in reviewing the final decision of the adjustment committee without any procedural safeguards would not meet the procedures required to comport with due

process. Since this interpretation would at least raise serious constitutional doubts, it would violate the canon of statutory construction of reading a statute to avoid constitutional doubts. *United States v. X-Citement Video, Inc.*, No. 93-723, 1994 U.S. LEXIS 8601 *26 (November 29, 1994).

Interpreting the regulation to require the administrator to review the finding of the adjustment committee based on standards the committee must apply avoids this constitutional infirmity.

Petitioner relies on *Olim v. Wakinekona*, 461 U.S. 238 (1983), for their position that discretion in the administrator prevents the creation of a liberty interest. The Hawaii regulations at issue in *Olim*, however, "place[d] no substantive limit on official discretion and thus create[d] no liberty interest" Rule IV, the regulation at issue, provided procedures related to a committee that merely made a recommendation to

the administrator of what facility to assign an inmate. *Id* at 242. The administrator was the sole decisionmaker under Rule IV, and had completely unfettered discretion to transfer the inmate, as the Supreme Court of Hawaii had held in an earlier case. *Id* at 249. Under the regulation in *Olim*, there is no decision until the administrator decides, the Committee solely issues a recommendation. However, under the Hawaii prison disciplinary regulations, the adjustment committee makes the decision, it does not issue a mere recommendation.

The administrator's role under the regulations is that of reviewing the decision of the adjustment committee. The Hawaii prison disciplinary regulations provide for two means for review of the "decision of the adjustment committee." First, the inmate has the "right to seek administrative review of the decision of the . . . adjustment committee through the grievance process." Haw. Admin.

R. § 17-201-20(a). Second, the administrator "may also initiate review of any adjustment committee decision and it shall be within the administrator's discretion to modify any committee findings or decisions." Haw. Admin. R. § 17-201-20(b). The administrator's role in the process is that of appellate review. This does not allow the administrator to circumvent the requirements in the regulations that the substantive predicate of misconduct must be demonstrated by substantial evidence.

The administrator's review is of the decision or findings of the adjustment committee. The "finding" of the adjustment committee to be reviewed is "a finding of guilt" of the substantive predicate of misconduct. "A finding of guilt shall be made where: (1) The inmate or ward admits the violation or pleads guilty; (2) The charge is supported by substantial evidence." Haw. Admin. R. § 17-201-18(b). If sanctions are rendered, they must be "commensurate with the

gravity of the rule and of the violation."

Haw. Admin. R. § 17-201-19(a). The regulation goes on to state that the inmate shall be given a written summary of the findings, and the findings will set out the evidence relied upon and the reasons for the action of the committee. Haw. Admin. R. § 17-201-18(c).

The administrator's function in the process is to review the Committee's decision of whether "the charge is supported by substantial evidence." Haw. Admin. R. § 17-201-20(b). Nowhere does the regulation eliminate the requirement of a finding of guilt prior to the imposition of punishment. This more logical interpretation of the prison disciplinary regulations also avoids violating the Due Process clause of the Fourteenth Amendment.

E. Mandatory Outcomes Are Not Required To Create A Liberty Interest.

As discussed above, *Kentucky Dept. of Corrections v. Thompson* reiterated this Court's longstanding test that "the use

explicitly mandatory language in connection with the establishment of specified substantive predicates to limit discretion, forces a conclusion that the state has created a liberty interest." 490 U.S. 454, 463 (1989) (citing *Hewitt*, 459 U.S. at 472) (internal quotations omitted). To be relevant, the mandatory language must be connected with the existence of substantive predicates before an outcome may be imposed. There is no requirement that the outcome must be imposed.

Petitioner claims that this Court reasoning in *Thompson* went as follows: under the statute, even though "'visitors may be excluded if they fall within one of the described categories,' 'they need not be,' and hence the rules were 'not mandatory.'" Pet. Br. at 38-39 (citing *Thompson*, 490 U.S. at 463-64). This turns *Thompson* on its head. According to this Court, "[t]he search is for relevant mandatory language that expressly requires the decisionmaker to apply certain

substantive predicates in determining whether an inmate may be deprived of the particular interest in question." *Id* at 465 n.4. There is no requirement that the inmate must be deprived of the interest in question.

Stating the rule in *Thompson* as requiring mandatory outcomes is directly contrary to this Court's opinions in both *Wolff* and *Hewitt*. The statute in *Wolff* did not have a "mandatory outcome" of loss of goodtime credits, but listed a variety of punishments that the warden may impose for serious misconduct. *Wolff*, 718 U.S. at 545 n.5. This Court, however, found a liberty interest based on the punishment that was actually imposed. Similarly, in *Hewitt*, the statute provided that an inmate "may" be temporarily confined, not that the inmate "must" be temporarily confined. *Hewitt*, 459 U.S. at 471. Nothing in the statute mandated the outcome that the administrator place the inmate in administrative segregation if the substantive

predicates were present. The Petitioner mischaracterizes this Court's precedent by stating mandatory outcomes are required for a statute to create a liberty interest.

II. THE PRINCIPLE OF STARE DECISIS REQUIRES THE RETENTION OF THE RULE RECOGNIZING STATE CREATED LIBERTY INTERESTS IN FREEDOM FROM SOLITARY CONFINEMENT.

A. Numerous Decisions Have Relied Upon And Applied The Rule The Court First Announced In *Wolff*.

Stare decisis should be applied to preserve the rule first announced by this Court in 1974 in *Wolff v. McDonnell* that procedures are required when disciplinary solitary confinement is imposed. 418 U.S. at 572 n.19. The Court recognized that solitary confinement "represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct."

This Court has repeatedly relied on the rule announced in *Wolff*. In 1980, in *Hughes v. Rowe*, 449 U.S. 5 (1980), the Court applied

Wolff in an 8-1 decision reversing the dismissal of a complaint. The inmate alleged that assignment to punitive segregation for two days, with neither notice of the charge nor a prior hearing, violated due process. In his concurrence, Justice White stated: "Under *Wolff v. McDonnell* a prior hearing was required for the particular disciplinary action involved here -- segregation and loss of goodtime." *Id* at 14 (citations omitted). Again in 1980, the Supreme Court in *Vitek v. Jones*, 445 U.S. 480 (1980), relied on *Wolff* to show that statutes restricting conditions of confinement create liberty interests. The Court recognized that in *Wolff* the "state created liberty interest" analysis had been applied to solitary confinement.

In 1983, then Justice Rehnquist relied on the 1978 summary affirmance in *Enomoto v. Wright*, 434 U.S. 1052 (1978), of a District Court ruling that "state law had created a liberty interest in confinement in any sort of

segregated housing within a prison." *Hewitt*, 459 U.S. at 469. Petitioner and amici in support of Petitioner would reverse all of these cases and the settled expectations of minimum procedural protections before an inmate is committed to solitary confinement.

B. The Considerations Of *Stare Decisis* Justify Retention Of The Rule Recognizing State Created Liberty Interests In Solitary Confinement.

This Court should follow its line of decisions recognizing that states can create liberty interests in freedom from segregation in prisons. None of the "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case," justify any departure from *stare decisis*. *Planned Parenthood v. Casey*, 505 U.S. , 112 S. Ct. 2791, 2808 (1992).

1. Requiring Due Process Before The Imposition Of Solitary Confinement Is Not Unworkable.

One consideration identified in *Casey* is whether the rule that a state created liberty interest can exist in freedom from "solitary" confinement has proven unworkable. *Id* at 2809. Neither the briefs of Petitioner nor the amici in support of Petitioner show that requiring some procedural safeguards attendant to imposition of solitary confinement is unworkable. Also, scholars of prison administration favor procedural safeguards for serious prison disciplinary actions and have demonstrated the salutary effects of procedural fairness on prison peace and safety.

Prior to this Court's decision in *Wolff*, the system of prison discipline was one of ill defined disciplinary offenses with little or no procedural safeguards. Robertson, *Impartiality and Prison Disciplinary Tribunals*, 17 N.E. J. of Crim. & Civ.

Confinement 301, 305-06 (1991). The vague language and limited procedures gave prison officials unfettered discretion in matters of discipline. DiIulio, Administering Discipline in Federal Bureau of Prisons, 3 Federal Prisons Journal 61 (1994). Over the last twenty years, a consensus has emerged in favor of providing to each prisoner written rules regarding prison discipline and the penalties for infractions. American Correctional Association, Standards for Adult Correctional Institutions 91-95; DiIulio, 3 Federal Prisons Journal at 61. Guidelines also favor providing specific procedures for adjudicating the charge and disclosing the outcome. American Correctional Association, Standards for Adult Correctional Institutions 93-95. Petitioner argues for a return to the time of unfettered discretion for the infliction of punishment without any procedural due process protections for inmates. That is a return to the pre-Wolff period that resulted in

deplorable conditions for prisoners and serious prison uprisings.

Petitioner's concerns regarding the impact on prison discipline are more appropriately addressed in the procedural balancing that occurs after the determination of a liberty interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The sole question this Court accepted for review is whether a liberty interest is created by Hawaii's statute and regulations. Therefore, the only issue presented is whether a liberty interest is created and any procedures at all are required under the Fourteenth Amendment due process clause; not which procedures must be provided. The State's purported interest in swift and sure punishment is to be taken into account in applying the *Mathews* balancing test to determine the specific procedures required. States can always present evidence and arguments in the balancing test under *Mathews* to try to justify lessened procedures. But

nowhere has it been shown that application of the *Mathews* test would result in no procedures whatsoever. That would be the effective result of a decision that states cannot create liberty interests in freedom from solitary confinement.

2. **Elimination Of Due Process Protections Before The Imposition Of Solitary Confinement Will Cause Inequity And Unrest.**

Another consideration in *Casey* is whether the elimination of state created liberty interests in freedom from solitary confinement would cause "serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it." *Casey*, 112 S. Ct. at 2809. Certainly a major positive effect of recognizing that solitary confinement is a liberty interest is upon internal peace at prisons.

Procedures allow for prisoners to know the reasons for being sentenced to solitary confinement and gives them some chance, albeit

limited, to present their side to a decisionmaker rather than internalize their anger and rage. It is a fundamental precept of due process that it is unfair to punish a person for violating a rule without first notifying that person of the rules. Resource Ctr. on Correctional Law and Legal Services, Am. Bar Ass'n, Comm'n on Correctional Facilities and Services, Survey of Prison Disciplinary Practices and Procedures 13 (1974). The lack of such notice contributes to the perception that disciplinary authority will be exercised arbitrarily. *Id.* The perception of arbitrary discipline creates, or at least exacerbates, disciplinary problems. *Id.* Guards and prison administrators can rely on the procedures to calm unruly inmates by assuring them that they will know the reasons for the action and have a chance to be heard. Assuring minimum fairness and procedures before the most serious discipline of solitary

confinement is imposed may lessen disciplinary problems.

3. Due Process Protections Before The Imposition Of Solitary Confinement Is Not A Doctrinal Anachronism.

A third consideration is whether the law's growth in the intervening years (20 years since *Wolff*) has left the rule a "doctrinal anachronism discounted by society." *Casey*, 112 S. Ct. at 2809. All of the cases relied on above have been part of the ongoing recognition of state-created liberty and property interests under this Court's Fourteenth Amendment analysis. Indeed, this Court's decisions have extended state-created liberty interests to administrative segregation, *Hewitt*, 459 U.S. 460; and to transfers to mental hospitals, *Vitek*, 445 U.S. 480. Also, the Court has repeatedly rejected efforts by states to limit the procedures to be used with respect to a state-created liberty interest by rejecting the "bitter with the sweet" approach, *Vitek*.

4. Factual Premises That Formed The Basis For *Wolff's* Recognition Of Due Process Protections Before The Imposition Of Solitary Confinement Have Not Changed.

A fourth consideration is whether the factual premises underlying the Court's recognition of a liberty interest in not being sent to solitary confinement as punishment have changed. The factual premises concerning the severity of the deprivations caused by solitary confinement remain true today. Solitary confinement is clearly a serious punishment, and one that all states use for disciplining prisoners. Solitary confinement is the most common penalty inflicted in state prisons for rules violations. Bureau of Justice Statistics, U.S. Dept of Justice, Prison Rules Violators 6, Table 12 (Dec. 1989) (31% of punishments include solitary confinement). In Hawaii, solitary confinement is the most severe punishment imposed, and requires written approval of the administrator and periodic review of the inmate's

confinement if imposed for more than 60 days. Haw. Admin. R. § 17-201-19(a)(2). See full discussion of solitary confinement in Section IIIA, *infra*.

5. **The Result In *Wolff* Of The Recognition Of Due Process Protections Before The Imposition Of Solitary Confinement Is Not Fortuitous.**

None of the considerations set out by Chief Justice Rehnquist in *Payne v. Tennessee*, 501 U.S. 808 (1991), for overruling prior precedents are met in this case. In *Payne* the Court overruled two prior decisions, one 4 years old, *Booth v. Maryland*, 482 U.S. 496 (1987), and the other 2 years old, *South Carolina v. Gathers*, 490 U.S. 805 (1989), that the Eighth Amendment barred the admission of victim impact evidence during the penalty phase of a capital trial. The Court rejected *stare decisis* because it determined that application of the current rule turned on a "fortuity" in the facts of each case, rather than a reasoned distinction and was therefore

arbitrary. *Payne*, 501 U.S. at 828-29. Here there is no fortuity, the State of Hawaii adopted statutes and rules defining the substantive predicates and mandatory standards that govern the use of punitive segregation.

These provisions were assuredly reviewed by high level prison officials and probably by government attorneys as well. The criteria are set out with specificity and organized in different categories according to levels of seriousness of the violations. The disciplinary regulations became effective in 1983, well after this Court had established the rule for state created liberty interests. Adoption of the Hawaii statutes and regulations was a conscious, deliberate judgment of Hawaii's officials and not a fortuity arising in the facts of an individual case that would cause an arbitrary result. As argued above, the test of *Wolff* and its line of cases has not proven unworkable or unduly costly, which are other reasons identified by

Chief Justice Rehnquist in *Payne* for overruling past doctrine.

Justice Souter, in his concurrence, required a "special" justification to depart from precedent in constitutional cases. *Payne*, 508 U.S. at 842. This case presents no special justification. In considering the value of procedures in connection with use of solitary confinement, this Court has referred to the support for procedural safeguards by experts in penology and prison administration. "The creation of procedural guidelines to channel the decision making of prison officials is in the view of many experts in the field, a salutary development." *Hewitt*, 459 U.S. at 471. The doctrine of *stare decisis* supports the recognition of a state created liberty interest in this case.

III. PRISON DISCIPLINE LENGTHENS THE DURATION OF CONFINEMENT AND SERIOUSLY IMPACTS THE NATURE OF CONFINEMENT.

In *Wolff*, due process protections were required because solitary confinement is a

"major change in the conditions of confinement." *Wolff*, 418 at 572 n.19. Hawaii's punishing an inmate by confinement in disciplinary segregation both significantly worsens the conditions of confinement and may well lengthen the term of confinement.

A. Solitary Confinement Remains A Major Change In Conditions Of Confinement.

Solitary confinement today remains as serious a change in conditions of confinement as concerned this Court in *Wolff*. Prison officials have regularly used punitive segregation, or solitary confinement¹, as punishment for the most serious violations of prison rules, and have done so since the early nineteenth century. *Mushlin, Rights of Prisoners* 40 (1993). Solitary confinement, both punitive and administrative, is authorized in every American jurisdiction. *Marin, Inside Justice* 96 (1983). Solitary

¹Solitary confinement is also called isolation, disciplinary segregation and punitive segregation, but the prisoners simply know it as "the hole." *Marin, Inside Justice* at 95.

confinement is the most common penalty inflicted in state prisons for rules violations. Bureau of Justice Statistics, U.S. Dept of Justice, Prison Rules Violators 6, Table 12 (31% of punishments include solitary confinement).

Description of the often horrible conditions of solitary confinement could fill volumes. The deplorable conditions that have come to the attention of federal courts include no toilets, soap or showers; inadequate light and air; forcing to sleep on cold steel or concrete floor; and the presence of rats, mice and other vermin. Mushlin, Rights of Prisoners at 44-46. Solitary confinement and punitive segregation are normally intended as punishment. For that reason, the courts entertain challenges to the physical conditions of solitary confinement under the cruel and unusual punishment prohibition of the Eighth Amendment. See *Hutto v. Finney*, 437 U.S. 678 (1978).

Solitary confinement inflicts serious harms upon the inmates, even in the absence of brutal or unhygienic conditions. Mushlin, Rights of Prisoners 40. This Court, as early as 1890, recognized the serious harm that resulted to inmates from complete isolation:

A considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

In re Medley, 134 U.S. 160 (1890). Recent studies confirm the serious emotional consequences that result when isolation is used for discipline, even in the absence of unhygienic conditions. Luise, Note, Solitary Confinement: Legal and Psychological Considerations, 15 N.E. J. on Crim. & Civ. Confinement 301, 317 (1989) (discussing the literature that documents declines in mental

function and sometimes hallucination and delusions).

Solitary confinement is clearly a serious punishment. The American Correctional Association considers disciplinary segregation as a last resort punishment for serious violations, and may "only occur after an impartial hearing has established that there was a serious violation of conduct regulations and that there is no adequate alternative disposition to regulate the inmate's behavior." American Correctional Association, Standards for Adult Correctional Institutions 126 (1981). In Hawaii, solitary confinement is the most severe punishment imposed. Haw. Admin. R. § 17-201-19(a)(2). The rule Petitioner argues for would allow any inmate in the United States to be thrown into solitary confinement without any process at all.

B. Parole Authorities Must Be Able To Depend On The Accuracy Of Prison Disciplinary Decisions.

All parole authorities rely upon prison disciplinary records in parole decisions. Parole agencies must have confidence in the disciplinary decisions made by prison administrators. Permitting prison officials to impose discipline without a hearing, as argued by the Petitioner, will require parole decisionmakers to make release decisions based on inaccurate information.

No disciplinary hearings will degrade the quality of parole decisionmaking. Parole agencies will be required to assess an inmate's risk to society on the basis of untested, unverified, and possibly false information. Currently, when an inmate has been found guilty of a disciplinary infraction following a hearing, parole boards take the infraction as proven. Hawaii's regulations are typical. The Hawaii Paroling Authority may deny parole when the parole candidate has

been a management problem, "as evidenced by the inmate's misconduct record." Haw. Admin. R. § 23-700-33(b). While the petitioner argues that parole may be granted despite a record of misconduct, Pet. Br. at 10, the regulations do not provide any framework for the Paroling Authority to determine that the misconduct did not in fact occur as reported in the prison's records. Many jurisdictions, like Hawaii, will be required to make release decisions on the basis of inaccurate or incomplete information.

Parole is a well-established mechanism for the conditional release of inmates prior to the completion of their sentences. Parole authorities currently operate in all fifty states, the District of Columbia, and the federal system.² As part of the parole

²In 1991, researchers from the Association of Paroling Authorities, International, surveyed all 50 states, the District of Columbia, and the United States Parole Commission. All jurisdictions responded and reported on their parole practices as of December 30, 1990. See Runda, Rhine & Wetter, *The Practice of Parole Boards* xii (1994). No jurisdiction stated that it did not have a parole authority.

process, every single one of these parole agencies considers inmates' prison disciplinary records. If parole officials are to rely upon prison disciplinary decisions, it is essential that those decisions be based upon proper evidence and regularized procedures.

Prison disciplinary records remain an important factor in contemporary parole decisionmaking, regardless of the structure of the parole determination. See, e.g., 18 U.S.C. §§ 4206(a), 4207(1) (U.S. Parole Commission "shall consider" reports by prison staff, and may parole a prisoner if he "has substantially observed the rules of the institution or institutions where he has been confined"); 15 CAL. CODE REG. § 2281(c)(6) (circumstances tending to show unsuitability for parole include a record of serious misconduct in prison); 730 ILL. ANN. STAT. § 5/3-3-5(c)(3) (Smith-Hurd 1993) (board shall not parole inmate if release would have

substantially adverse impact on institutional discipline).³

A recent publication has just removed any possible uncertainty about the importance that parole boards place on prison disciplinary records. See Runda, *The Practice of Parole Boards* xii. Each parole board ranked the significance of certain factors in the parole decision process. The parole factors were assigned to one of five categories, from "considered and very important" to "not considered." *Id.* at 11. One of the factors was inmates' "prison discipline record." *Id.*, App. A. Of the fifty-two jurisdictions, twenty-three stated that "prison discipline record" was "considered and very important";⁴

³See also Special Committee on Correctional Standards, LEAA, *Selected Correctional Standards*, reprinted in W. Parker, *Parole* 204 (1972) (stating that parole board should have available report on inmate's institutional adjustment).

⁴Those jurisdictions were Alaska, Arizona, California, Florida, Kansas, Louisiana, Massachusetts, Maryland, Maine, North Dakota, Nebraska, New Hampshire, New Mexico, Nevada, Ohio, Rhode Island, South Carolina, Virginia, Vermont, Washington, Wisconsin, West Virginia and Wyoming. *Id.*

twenty-three stated that it was "considered and important";⁵ and six stated that it was "considered and somewhat important."⁶ Most significantly, none of the fifty-two jurisdictions said that prison discipline record was "considered but not important" or was "not considered." *Id.* Prison discipline impacts parole and lengthens many inmate's terms in prison.

IV. THE ABILITY OF PRISON AUTHORITIES TO IMPOSE ADMINISTRATIVE SEGREGATION UPON INMATES DOES NOT REMOVE THE LIBERTY INTEREST OF INMATES IN AVOIDING PUNITIVE SEGREGATION.

Petitioner argues that the administrator's discretion to impose administrative segregation removes the liberty interest that the regulations create in an inmate remaining free from disciplinary

⁵Those jurisdictions were Alabama, Arkansas, Colorado, Connecticut, District of Columbia, Georgia, Iowa, Idaho, Indiana, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, New Jersey, New York, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas and Utah. *Id.*

⁶Those jurisdictions were Delaware, Hawaii, Illinois, Kentucky, Oregon and the U.S. Parole Commission. *Id.*

segregation. Pet. Br. at 45-47. The unstated premise of this argument is that administrative segregation imposes identical deprivations on inmates that disciplinary segregation imposes. To the contrary, this Court has recognized that disciplinary segregation imposes more severe deprivations on inmates. Then Justice Rehnquist recognized that disciplinary segregation was more severe than administrative segregation because: (1) the stigma of wrongdoing or misconduct attaches to punitive segregation, and (2) administrative segregation does not have an impact on parole. *Hewitt v. Helms*, 459 U.S. 460, 473 (1983).

Disciplinary segregation is distinct from administrative segregation because it is punishment and the inmate is subject to greater deprivations of liberty. Disciplinary segregation is solitary confinement imposed on an inmate for violations of prison rules, and is the last resort punishment for serious

rules violations. Haw. Admin. R. § 17-201-19. Administrative segregation is non-punitive in nature and may be imposed when an inmate is a risk to prison security. Haw. Admin. R. § 17-201-22. Disciplinary segregation is distinct from administrative segregation because it is punishment, and it impacts the duration of confinement as discussed in Section III, *supra*.

A. Disciplinary Segregation Is Punishment And Distinct From Administrative Segregation.

Petitioner argues that because Hawaii prison administrators have discretion to impose upon inmates administrative, non-punitive segregation, inmates cannot have a liberty interest in avoiding punitive segregation. However, this Court's jurisprudence concerning punishment has consistently rejected Petitioner's argument.

In *Allen v. Illinois*, 478 U.S. 364 (1985), petitioner Allen argued that he was entitled to the protection of the Fifth

Amendment's right not to incriminate himself in a proceeding under the Illinois Sexually Dangerous Persons Act. His argument was predicated upon the fact that a finding that he was a sexually dangerous person would result in his indefinite confinement in a maximum security state prison called the Menard Psychiatric Center ("Menard"). Other than a small number of other sexually dangerous persons, all of the inmates at Menard were convicted criminals who were serving sentences following felony convictions, and had been placed in Menard because its facilities for treating mentally ill inmates were better than those available in other Illinois prisons.

This Court rejected Allen's self-incrimination claim because it found that he was not being punished. In so doing the Court explained that the confinement was not punishment because it had not been shown to be inconsistent with the state's legitimate non-

punitive interest in treating him. That is, virtually identical forms of confinement may be classified as punitive or non-punitive based upon the government's intent. *Id* at 373.

Similarly, this Court has upheld pretrial detention of both juveniles and adults by focussing primarily on the purpose of confinement. *Bell v. Wolfish*, 441 U.S. 520 (1979); *Schall v. Martin*, 467 U.S. 253 (1984). Confinement is not punitive if "an alternative purpose to which [the restriction] may rationally be connected is assignable for it and [if it is not] excessive in relation to the alternative purpose assigned [to it]." *United States v. Salerno*, 481 U.S. 739, 747 (1987). This court has consistently held that preventing danger to others is a legitimate regulatory purpose for confinement which will not render confinement punitive for constitutional purposes. *Id*; *Wolfish*; *Allen*.

Thus, a prison, like the Halawa Correctional Facility, may impose segregation for a variety of legitimate regulatory, non-punitive purposes. But when a prison chooses to punish an inmate for violating prison rules, the Due Process Clause requires it to provide appropriate procedural protections. The logical result of the Petitioner's argument would be that since this Court permitted sexually dangerous persons to be confined in the Menard Psychiatric Center with criminal inmates who the state is punishing, *Allen*, 478 U.S. at 373, the criminal inmates would lose their rights under the Fifth Amendment. Similarly under the Petitioner's logic, this Court's holding that pretrial detention in *Salerno* and *Wolfish* was not punishment would permit the government to impose punitive confinement without a trial, so long as the defendants being punished are confined in the same facility as pretrial detainees. Since this Court in both *Salerno*

and *Allen* specifically relied upon the governments' representations that it had no intent to punish, it is doubtful that the Court intended to sanction such results.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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Benjamin & Lux, Solitary Confinement as Psychological Punishment, 13 Cal. W.L. Rev. 265 (1977)	18
Benjamin & Lux, Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine State Prison, 2 New Eng. J. Prison L. 27 (1975).	18
David Fogel, Let's Nationalize the State Prisons, in Prisoners and the Law 19-3 (Robbins ed. 1972)	54
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INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of nearly 300,000 members, dedicated to preserving and protecting the Bill of Rights. The American Civil Liberties Union of Hawaii is one of the ACLU's state affiliates. The ACLU established the National Prison Project in 1972 to protect and promote the civil rights of prisoners. The ACLU thus has a particular interest in assuring that prisoners are not arbitrarily punished by solitary confinement.

The parties have consented to the filing of this brief as indicated by their letters of consent filed with the Clerk of the Court.

STATEMENT OF THE CASE

Respondent David Conner has been incarcerated in the Halawa Correctional Facility since September 1985. On August 25, 1987, Conner was charged with "physical interference or obstacle resulting in the obstruction, hinderance, or impairment of the performance of a correctional function of a public servant." Under the regulations of the Hawaii Department of Corrections this is a "high misconduct" offense. Pet. App. A65.¹ The Respondent denied guilt and requested that he be allowed to call staff witnesses to his disciplinary hearing; his request was denied. On August 28, 1987, he was found guilty and was sentenced to thirty days disciplinary segregation on the high misconduct charge. Pet. App. A66.

¹ Respondent was charged with additional "low moderate" offenses. All charges stemmed from one strip search by a correctional officer. Pet. App. A66.

Conner filed a federal civil rights challenge to the disciplinary proceedings.² The district court granted summary judgment against Respondent on this claim. On appeal, the Ninth Circuit held that Hawaii disciplinary regulations conferred upon Respondent a liberty interest in not being arbitrarily placed in disciplinary segregation. The court therefore held that the lower court had improperly granted summary judgment and it remanded for a determination of whether, under Wolff v. McDonald, 418 U.S. 539 (1974), the denial of Respondent's request for witnesses violated his rights under the Due Process Clause. Conner v. Sakai, 15 F.3d 1463 (9th Cir. 1993).

² After Respondent had completed the time in segregation as a result of the disciplinary finding, and while the action was pending in the district court, the Deputy Administrator of the facility ordered the finding of high misconduct expunged.

SUMMARY OF ARGUMENT

Petitioner urges this Court to adopt a rule that would permit a prisoner to be judged guilty of serious misconduct and punished by lengthy solitary confinement, without any due process safeguards against wholly arbitrary decisions. This position, if adopted by the Court, would represent a major departure from its previous decisions, and would unsettle a large body of precedent in the lower courts based on those decisions.

In Wolff v. McDonnell, 418 U.S. 539 (1974), Cox v. Cook, 420 U.S. 734 (per curiam), reh'g denied, 421 U.S. 955 (1975), and Hughes v. Rowe, 449 U.S. 5 (1980) (per curiam), the Court stated that prisoners have rights stemming from the Due Process Clause not to be arbitrarily subjected to determinations of major misconduct and punishment with solitary confinement. The Court's later decisions in Vitek v. Jones, 445 U.S. 480, (1980), and Hewitt v. Helms, 459 U.S. 460 (1983), underscore the need for due process

protections when prison officials take action, such as punitive segregation, which results in a major change in the conditions of confinement, and involves stigmatization and possible collateral consequences such as parole denial.

Moreover, in its decisions in Wolff, Vitek, Hewitt, Olim v. Wakinekona, 461 U.S. 238 (1983), and Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454 (1989), the Court made clear that state law, by limiting prison officials' discretion to curtail a prisoner's liberty, may create a further liberty interest giving rise to due process rights. Regulations governing the Department of Corrections of the State of Hawaii dictate that determinations of serious misconduct punishable by disciplinary segregation may be made only upon evidence of guilt of a specific rule violation. The great majority of the lower courts that have addressed the issue, including the Second, Third, Fifth, Seventh, Eighth and Ninth Circuits, have reached the conclusion that, in these circumstances,

prisoners have a reasonable expectation, giving rise to a liberty interest, that they will not be found guilty of and punished for serious misconduct without due process safeguards.

ARGUMENT

I. THIS COURT HAS ALREADY RECOGNIZED THAT STATE PRISONERS HAVE A LIBERTY INTEREST IN NOT BEING ARBITRARILY PUNISHED BY PLACEMENT IN SOLITARY CONFINEMENT

Petitioner argues that "[t]here simply is no support in precedent for the recognition of 'liberty interests' with respect to an assignment to disciplinary segregation under any circumstances when such an assignment carries with it no loss of good time credits, and no necessary impact on parole." (Pet'r Br. at 19-20.) If her position were adopted, it would mean that a prisoner who obeys all prison rules could be found guilty of major misconduct and punished by lengthy solitary confinement, without any due process safeguards.³

Petitioner's claim that precedent is on her side is inaccurate. Her position, if adopted by the Court, would represent a significant departure from the decisions of this Court and of the

³ According to Petitioner, this should be the case even if state law provides, as does that of Hawaii, that misconduct in prison may be grounds for parole denial.

lower courts, which have long recognized that prisoners have a liberty interest in not being subjected to arbitrary punishment by way of solitary confinement.

In Wolff v. McDonnell, 418 U.S. 539 (1974), a Nebraska state prisoner claimed that prison disciplinary proceedings against him, which had resulted in the loss of statutory good-time credits, violated the Due Process Clause. Nebraska's statute provided that in cases of flagrant or serious misconduct prison officials "may order" that statutory good-time credits "be forfeited or withheld and also that the person be confined in a disciplinary cell." Id. at 546-47.

The Court explicitly "reject[ed] the assertion of the State" that "the interest of prisoners in disciplinary procedures is not included in that 'liberty' protected by the Fourteenth Amendment. Id. at 556-557. The Court concluded that even though the Constitution does not

guarantee good-time credit for satisfactory behavior while in prison, nevertheless,

the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated. This is the thrust of recent cases in the prison disciplinary context. In Haines v. Kerner, [404 U.S. 519 1972] (per curiam)], the state prisoner asserted a "denial of due process in the steps leading to [disciplinary] confinement." (citation omitted). We reversed the dismissal of the § 1983 complaint for failure to state a claim. In Preiser v. Rodriguez, [411 U.S. 475 (1973)], the prisoner complained that he had been deprived of good-time credits without notice or hearing and without due process of law. We considered the claim a proper subject for a federal habeas corpus proceeding.

Id. at 557. By illustrating its point with a disciplinary confinement case (Haines) as well as a good-time forfeiture case (Preiser), the Court indicated that its holding applied to both situations.

The Court went on to explain why a prisoner's interest in not being arbitrarily punished

by solitary confinement, like loss of good-time credits, does have "real substance" implicating due process rights. Stating that the same procedures that were appropriate for disciplinary proceedings involving the possibility of loss of good-time were appropriate for disciplinary proceedings involving solitary confinement, the Court reasoned as follows:

it would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue. The latter represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here, as in the case of good time, there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction.

Id. at 571 n.19.

A year later, in Cox v. Cook, 420 U.S. 734 (per curiam), reh'g denied, 421 U.S. 955 (1975), the Court reiterated the proposition that prisoners have a liberty interest in disciplinary determinations resulting in solitary confinement, without linking that interest to a

loss of good-time credits. The Court held that an inmate who claimed he had been disciplined without notice of the misconduct charged or an opportunity to meet the charges could not rely on the rule announced in Wolff since the disciplinary action pre-dated Wolff, and Wolff had expressly held that the due process requirements it set forth for prison disciplinary cases were not to be applied retroactively. However in its per curiam opinion the Court stated, "[i]n Wolff v. McDonnell, (citation omitted), we held that a state prisoner was entitled under the Due Process Clause of the Fourteenth Amendment to notice and some kind of hearing in connection with discipline determinations involving serious misconduct." Cox, 420 U.S. at 736.

Five years later, in Hughes v. Rowe, 449 U.S. 5 (1980) (per curiam), in which a prisoner challenged placement in segregation prior to a disciplinary hearing, the Court again restated that disciplinary segregation implicates a liberty interest requiring due process. Without

any discussion of whether under state law disciplinary segregation would require loss of good-time credits or affect parole, the Court remanded for a determination of whether the segregation violated the prisoner's due process rights, stating, "the Court of Appeals correctly noted that the Fourteenth Amendment affords a prisoner certain minimum procedural safeguards before disciplinary action may be taken against him." Id. at 9.

In the case now before the Court, as in Wolff, the State has limited prison officials' discretion to impose punitive segregation to instances where serious misconduct has been charged and proved. Thus in this case, as in Wolff, the liberty interest arising directly under the Due Process Clause merges with the liberty interest created by the State. Indeed, it is difficult to conceive of any prison disciplinary system that would not limit serious punishment to cases where misconduct has been proved, thereby implicating due process rights.

See Part II infra. For this reason, no sharp distinction exists in the context of punitive segregation between liberty interests that arise directly under the Due Process Clause and those that arise under State law.

In decisions subsequent to Wolff, the Court articulated the principle that distinguishes disciplinary confinement, which always requires due process protections, from many other prison administrative decisions, in which due process protections are required only if the State has created a liberty interest. That distinction, as set forth below, turns on whether the curtailment of the liberty at issue is within the range of conditions to which the sentence itself subjects the prisoner. Under this analysis, disciplinary confinement is not within the range of conditions entailed by the sentence to prison itself, because it is "normally imposed only when it is claimed and proved that there has been a major act of misconduct." Wolff, 418 U.S. at 571 n.19.

In Meachum v. Fano, 427 U.S. 215, 225 (1976), the Court held that the Due Process Clause does not require State prison officials to conduct a factfinding hearing before transferring an inmate to a more restrictive prison, because confinement in any of the State's prisons is "within the normal limits or range of custody which the conviction has authorized the State to impose." The prisoner's misconduct might have been a basis for the transfer; but since a prisoner has no right to be confined in one prison rather than another, there was no right to "procedures that might be required by the Due Process Clause in other circumstances" to prove that misconduct. Id. at 228.

In Vitek v. Jones, 445 U.S. 480, 487-88 (1980), the Court held that transfer of a prisoner to a mental hospital did require due process protections.⁴ The Court found that,

⁴ The Court held that the prisoner's liberty interest stemmed directly from the Due Process Clause in avoiding the transfer, and that a liberty interest was created by state law as well. The statute authorized a prisoner's

although a sentence to prison extinguished a prisoner's right to freedom from confinement, the conditions or degree of confinement nonetheless had to be within the range of conditions to which the prison sentence itself subjected the prisoner. Unlike transfer to another prison, confinement in a mental hospital is "qualitatively different from the punishment characteristically suffered by a person convicted of a crime." so it is not within the range of conditions authorized by the sentence. Id. at 493. The Court noted the adverse social consequences and stigmatization resulting from mental hospital commitment, as well as the fact that transfer exposed the prisoner to behavior modification programs representing a major change in the conditions of confinement. Id. at 492.⁵

transfer to a mental hospital if a designated physician or psychologist found the prisoner to be suffering from a mental disease or defect that could not be treated in prison. Id.

⁵ Vitek specifically notes the language in Wolff applying due process protections to the imposition of solitary confinement because such punishment represents a major change in condi-

In Hewitt v. Helms, 459 U.S. 460 (1983), the Court distinguished for due process purposes between administrative segregation and punitive segregation in holding that transfer of a prisoner to more restrictive confinement for nonpunitive reasons does not require the full panoply of Wolff protections. The Court noted that confinement in administrative segregation could be imposed not only pending investigation of charges but also to protect a prisoner's safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or to hold a prisoner awaiting transfer or classification. Id. at 468. Accordingly, the Court concluded, "administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration." Id.

Furthermore, "[u]nlike disciplinary confinement the stigma of wrongdoing or misconduct

tions of confinement and is normally imposed only after proof of misconduct. Id. at 488.

does not attach to administrative segregation under [state law]." Id. at 473. Additionally, "there is no indication that administrative segregation will have any significant effect on parole opportunities." Id. In contrast, disciplinary determinations "are certainly likely to be considered by the state parole authorities in making parole decisions" and may have other serious "collateral consequences" in addition to the disciplinary sentence. Wolff, 418 U.S. at 565.

That is the case in Hawaii, where parole may be denied when the Authority finds that the "inmate has been a management or security problem in prison as evidenced by the inmate's misconduct record" or that the inmate "has a pending prison misconduct." Haw. Admin. R. § 23-700-33 (b) and (e). Petitioner fails to consider these consequences when she characterizes the punishment of solitary confinement as merely the loss of an insubstantial and trivial "privilege," namely, "the 'opportunity' to

socialize face-to-face with fellow maximum security convicts in a 'general population' module." (Pet'r Br. at 28-29.)⁶

Hewitt strongly supports the conclusion that disciplinary proceedings for major misconduct which may result in punitive segregation implicate due process rights under Wolff. As the Court recognized, the distinction between administrative and punitive segregation is a substantive one, even though the conditions of confinement may be virtually the same. Unlike administrative segregation, punishment for serious misconduct during incarceration is not "within the terms of confinement ordinarily

⁶ Petitioner also trivializes the potential psychological consequences of solitary confinement, which have been documented by a number of researchers. See, e.g., Benjamin & Lux, Solitary Confinement as Psychological Punishment, 13 Cal. W.L. Rev. 265 (1977); Grassian, Psychopathological Effects of Solitary Confinement, 140 Am. J. Psychiatry 1450 (1983); Benjamin & Lux, Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine State Prison, 2 New Eng. J. Prison L. 27 (1975); Grassian & Friedman, Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement, 8 Int'l J.L. & Psychiatry 49 (1986).

contemplated by a prison sentence," and prisoners who abide by prison rules surely do not "reasonably anticipate receiving [disciplinary segregation] at some point in their incarceration." To the contrary: the maintenance of security and order in a prison is enhanced when prisoners have a reasonable expectation that if they obey prison rules and do not engage in misconduct, they will not arbitrarily be subjected to a determination of, or punishment for, serious misconduct. See Section III, infra.

II. STATE REGULATIONS THAT REQUIRE A FINDING BASED ON EVIDENCE OF SERIOUS MISCONDUCT AS A PREREQUISITE TO A DETERMINATION OF GUILT AND PUNISHMENT BY SOLITARY CONFINEMENT CREATE A LIBERTY INTEREST

Petitioner claims that the ruling in this case "launch[es] the lower federal courts on the mission of policing every assignment to disciplinary segregation in Hawaii's prisons[.]" (Pet'r Br. at 25.) She argues that a ruling that arbitrary punishment by way of solitary confinement could ever give rise to a federally protected liberty interest "qualitatively

expands" federal control over state prison management, and represents a radical departure from Supreme Court precedent. (Pet'r Br. at 24-27.) That is not the case. The Ninth Circuit's finding of a state-created liberty interest is entirely consistent with every one of this Court's decisions involving state-created liberty interests in prison cases. Furthermore, the majority of the circuit courts that have considered the question have concluded that disciplinary rules in themselves create a liberty interest, because the requirement of a finding of guilt based on evidence acts as a substantive limitation on the official's exercise of discretion.

A. The Ninth Circuit's Decision Is Entirely Consistent with Existing Precedent

The Ninth Circuit's opinion in this case, noting that "[t]he fourteenth amendment protects liberty interests arising from the Due Process Clause or created by state law," Conner v. Sakai, 15 F.3d 1463, 1466 (9th Cir. 1993), addressed the issue of whether a liberty inter-

est had been created by a Hawaii regulation which provides:

Upon completion of the [disciplinary] hearing, the committee may take the matter under advisement and render a decision based upon evidence presented at the hearing to which the individual had an opportunity to respond or any cumulative evidence which may subsequently come to light may be used as a permissible inference of guilt, although disciplinary action shall be based upon more than mere silence. A finding of guilt shall be made where:

(1) The inmate or ward admits the violation or pleads guilty.

(2) The charge is supported by substantial evidence.

Haw. Admin. R. § 17-201-18(b).

Applying the analysis in Kentucky Dep't. of Corrections v. Thompson, 490 U.S. 454 (1989), the court of appeals sought to determine whether the regulations established "substantive predicates," that is, particularized standards or criteria to guide the State's decisionmakers, and next, whether the state requires, in sufficiently mandatory language, that if the substantive predicates are met, a particular outcome must follow. Conner, 15 F.3d at 1466. The court of appeals concluded that Hawaii had

created a liberty interest in not being confined to disciplinary segregation, basing this conclusion on a finding that the applicable regulations provide that

the inmate must admit guilt or the prison disciplinary committee must be presented with substantial evidence before the committee may make a finding of guilt. If the inmate does not admit guilt, or the committee does not find substantial evidence, the particular outcome--freedom from disciplinary segregation--must follow. § 17-201-18(b).

Id.

1. Supreme Court Precedent

The Ninth Circuit's ruling is consistent with every one of this Court's decisions involving state-created liberty interests in prison cases. These cases hold that "a State creates a protected liberty interest by placing substantive limitations on official discretion." Olim v. Wakinekona, 461 U.S. 238, 249 (1983). The Court's "method of inquiry in these cases always has been to examine closely the language of the relevant statutes and regulations." Thompson, 490 U.S. at 461. "Neither the draft-

ing of regulations nor their interpretation can be reduced to an exact science." Id. at 462. The State may create a liberty interest "in a number of ways," the "most common" of which is "by establishing 'substantive predicates' to govern official decision making," and, further, "by mandating the outcome to be reached upon a finding that the relevant criteria have been met." Id. (quoting Hewitt, 459 U.S. at 472).

Petitioner claims that Thompson created a new "two-way mandatory outcome test." (Pet'r Br. at 38-39.) This test would find a liberty interest created by state statute or regulations only if they force officials to deprive an inmate of the liberty in question whenever the substantive predicates are met, in addition to preventing the liberty deprivation when the subjective predicates are not met. Thus, according to Petitioner, Hawaii's regulations do not create a liberty interest because they do not require officials to assign the prisoner to

punitive segregation upon a finding of serious misconduct. Id.

This interpretation of Thompson is logically unpersuasive. It wrests isolated phrases from the decision out of context and puts them at war with the thrust of the decision as a whole, as well as with the Court's reasoning and conclusions in Wolff, Vitek, Olim, and Hewitt, upon which the Thompson decision is explicitly grounded.

In Thompson, the Court concluded that regulations setting forth the categories of prisoners who might be excluded from visitation did not give inmates a liberty interest in receiving visitors because the regulations were not worded in such a way that an inmate could reasonably expect to enforce them against prison officials. The decision reiterates the holding in Olim, 461 U.S. at 249, that "a State creates a protected liberty interest by placing substantive limitations on official discretion." Thompson, 490 U.S. at 462. The Thompson decision

points out that the regulations in question "begin[] with the caveat that 'administrative staff reserves the right to allow or disallow visits[.]'" 490 U.S. at 464. The decision goes on to observe that the regulation provided that visitors "may" be excluded if they fall within one of the described categories, "but they need not be." Id. It further observes that under the regulation visitors need not fall within one of the described categories in order to be excluded. Id. The opinion concludes that the regulation lacked the requisite mandatory language to create a liberty interest. Id. at 465.

Petitioner seizes upon the Court's observation that under the regulation "[v]isitors may be excluded if they fall within one of the described categories...but they need not be," id. at 464, and asserts that the regulation's failure to require officials to exclude visitors who fall within a described category was the basis for the Court's conclusion that no liberty interest had been created. That fact was not,

however, the touchstone for the decision. The Court's reasoning was not that in order to create a liberty interest a regulation must require prison officials to exclude visitors in the enumerated categories, but rather that

[t]he overall effect of the regulations is not such that an inmate can reasonably form an objective expectation that a visit would necessarily be allowed absent the occurrence of one of the listed conditions. Or, to state it differently, the regulations are not worded in such a way that an inmate could reasonably expect to enforce them against prison officials.

Thompson, 490 U.S. at 464-465 (emphasis added).⁷

Petitioner's interpretation of Thompson, that to create a liberty interest, regulations must rob prison officials of the discretion to forego depriving inmates of the liberty in

⁷ "To the inmate the question of whether the official is forced to assign him to restrictive custody (or to refuse entry to his visitor) when a substantive predicate is met is irrelevant. The mandatory element of a regulation which an inmate would expect to enforce is the element which forces the official to keep the inmate in general population (or to admit the visitor)." Layton v. Beyer, 953 F.2d 839, 849 n. 16 (3d Cir. 1992) (rejecting the "two-way mandatory outcome" interpretation of Thompson).

question whenever substantive predicates are met, would put Thompson directly at odds with Hewitt, a decision upon which the Thompson Court explicitly relied. Hewitt indicates that to create a liberty interest, state law must bar prison officials from depriving the inmate of the liberty, unless the substantive predicates are met:

Clearly, the relevant "mandatory language" need not rob the administrator of discretion to forego the deprivation of the prisoner's liberty any time certain criteria are met. Instead, the language must force the administrator to refrain from imposing the restriction on the inmate in the absence of specified criteria being met.

Layton v. Beyer, 953 F.2d 839, 849 (3d Cir. 1992) (rejecting "two-way mandatory-outcome" interpretation of Thompson).⁸

⁸ See also Mendoza v. Blodgett, 960 F.2d 1425, 1429 (9th Cir. 1992), cert. denied, 113 S. Ct. 1005, 1027 (1993) (prison's "dry cell watch" regulation created a liberty interest, even though superintendent had discretion not to place prisoner on dry cell watch when there was reasonable suspicion that the prisoner had secreted contraband); Smith v. Shettle, 946 F.2d 1250, 1253 (7th Cir. 1991) (for purposes of creating a liberty interest, it makes no difference that the statute does not require but only permits segregation; "most statutes leave dis-

In Hewitt, the Court held that the State had created a liberty interest in not being arbitrarily confined to administrative segregation because

the Commonwealth has gone beyond simple procedural guidelines. It has used language of an unmistakably mandatory character, requiring that certain procedures "shall," "will," or "must" be employed, (citation omitted) and that administrative segregation will not occur absent specified substantive predicates--viz., "the need for control," or "the threat of a serious disturbance." [O]n balance we are persuaded that the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest.

Hewitt, 459 U.S. at 471-72.

In Hewitt, as here, the language creating the substantive predicate permitted (but did not require) officials to place certain restrictions on inmates under certain circumstances (an inmate who has allegedly committed misconduct "may" be placed in administrative custody based upon the administrator's assessment of the

cretion to the persons charged with their enforcement rather than commanding them to enforce the statute to the hilt") (dicta).

situation and the need for control; an inmate "may" be temporarily confined in administrative custody where it has been determined that there is a threat of a serious disturbance, or a serious threat to the individual or others. Hewitt, 459 U.S. at 471 n.6.) Prison officials thus retained discretion whether or not to place an inmate in administrative segregation under circumstances permitting the segregation. Yet the Court held that these substantive predicates, coupled with language mandating the procedures to be followed if the substantive predicates were met, "demand[ed]" the conclusion that the State had created a protected liberty interest. Hewitt, 459 U.S. at 472. See also Vitek, 445 U.S. at 480 (statute providing that if a designated physician finds that a prisoner suffers from a mental disease or defect that cannot be properly treated in prison, prison officials "may" transfer prisoner to a mental hospital implicates right to due process hearing); Wolff, 418 U.S. at 546-547 (statute pro-

vided that in cases of serious or flagrant misconduct, the chief executive officer "may" order loss of statutory good-time credit or disciplinary confinement, but did not require that outcome; nevertheless, due process rights implicated).

2. Precedent from Other Circuits

The Ninth Circuit's decision is in harmony with previous decisions by the Second, Third, Fifth, Seventh and Eighth Circuits, holding that disciplinary rules in themselves create a liberty interest because the requirement of a finding of guilt based on evidence places a substantive limit on the official's exercise of discretion. The Second Circuit has reasoned as follows:

When restrictive confinement within a prison is expressly imposed as a disciplinary sanction . . . there will ordinarily be no doubt that the confinement impaired a liberty interest protected by state law and that the due process procedures specified in Wolff are therefore required. The state statutes and regulations authorizing restrictive confinement as punishment upon a finding of a disciplinary infraction will invariably provide sufficient limitation on

the discretion of prison officials to create a liberty interest.

Sher v. Coughlin, 739 F.2d 77, 81 (2d Cir. 1984) (footnote omitted) (where transfer of prisoner to a special housing unit involving restricted confinement had an administrative, nonpunitive basis, the transfer did not entitle the prisoner to procedural due process). Likewise, the Fifth Circuit has found that disciplinary rules necessarily create liberty interests because they condition the officials' discretion to punish on a finding of guilt. Green v. Ferrell, 801 F.2d 765, 769 (5th Cir. 1986); Gibbs v. King, 779 F.2d 1040 (5th Cir.), cert. denied, 476 U.S. 1117 (1986). The Seventh Circuit has reached the same conclusion, see Gilbert v. Frazier, 931 F.2d 1581, 1582 (7th Cir. 1991) (prisoner "could not be placed in disciplinary confinement without a finding that he had violated a definite standard[]"); cf. Castaneda v. Henman, 914 F.2d 981 (7th Cir. 1990), cert. denied, 498 U.S. 1124 (1991) (where no substantive criteria exist to circumscribe a warden's discretion to designate

a transfer as one done for security rather than disciplinary reasons, a hearing is not constitutionally required). The Third and Eighth Circuits have also reached this conclusion. See Todaro v. Bowman, 872 F.2d 43 (3d Cir. 1989) (regulation barring punishment unless inmate broke disciplinary rules, combined with mandatory procedural regulations, created a liberty interest protected by due process): Pletka v. Nix, 957 F.2d 1480, 1484 (8th Cir.), cert. denied, 113 S. Ct. 163 (1992) (prisoners have a liberty interest in not being placed in special conditions of confinement for disciplinary reasons). But see Dudley v. Stewart, 724 F.2d 1493, 1495-96 (11th Cir. 1984) (disciplinary rules do not create liberty interest).

A few cases have held that prisoners placed in segregation are not entitled to the full procedural rights set down in Wolff. See Hensley v. Wilson, 850 F.2d 269, 283 (6th Cir. 1988) (where inmate did not lose any good time as result of disciplinary charges, Hewitt rather

than Wolff is the appropriate standard for determining his due process rights); Crosby-Bey v. District of Columbia, 786 F.2d 1182, 1185 (D.C.Cir. 1986) (officials replaced inmate's administrative with disciplinary segregation; procedures followed, which closely approximated Wolff requirements, constituted due process). Even these decisions, however, assume that placement in segregation implicates a liberty interest protected by due process.⁹

3. Hawaii's Regulation in Fact Meets a "Two-Way Mandatory Outcome" Test

Even if Petitioner were correct that Thompson created a "two-way mandatory outcome test," the Hawaii regulation at issue in this case

⁹ We believe that Hensley and Crosby-Bey are wrongly decided in that Wolff should apply to any serious punishment based on a factual finding that a prisoner has violated a rule. See Hewitt, 459 U.S. at 478 (distinguishing "subjective" and "intuitive" judgments underlying administrative segregation placements from questions for which "trial-type procedural safeguards" are appropriate). However, the question of what process is due is not within the scope of the question on which the Court granted certiorari and is therefore not before the Court.

would meet that test. The regulation requires the committee to find guilt if there is a confession or "substantial evidence" of a rule infraction, Haw. Admin. R. § 17-201-18(b), and precludes a finding of guilt unless there is a determination, based on more than the prisoner's silence in face of the charges, that he committed the misconduct. Id. See also Haw. Admin. R. § 17-201-17(b)(2) ("A plea of not guilty necessitates the consideration of evidence against the inmate or ward.")

B. Whether or Not State Law Requires Substantial Evidence of Guilt Is Irrelevant

Petitioner argues that the court of appeals' conclusion was based on a faulty reading of the regulations. (Pet'r Br. 40-41.) She points to the Court of Appeals' finding that under the provision in question, Haw. Admin. R. § 17-201-18(b), "the inmate must admit guilt or the prison disciplinary committee must be presented with substantial evidence before the committee may make a finding of guilt," and

asserts that "the rule simply provides no such thing." (Pet'r Br. at 40-41.) According to Petitioner, the provisions that a finding of guilt "shall be made where [the inmate] admits the violation or pleads guilty" or "the charge is supported by substantial evidence" leave the committee free to make a finding of guilt and to order punitive segregation "on the basis of any proof at all, so long as the disciplinary action is 'based on more than mere silence.'" (Pet'r Br. at 41.) This is so, according to Petitioner, because the rules "make no precise specification of when the adjustment committee 'shall' make a 'finding of innocence'; indeed the regulations make no reference to such sorts of findings at all." (Pet'r Br. at 11.)

This is an implausible reading of the regulations. Indeed, the Hawaiian Attorney General has himself interpreted the regulation in question just as the Ninth Circuit interpreted it. See infra section II.B.1. Furthermore, even if Petitioner is correct that the regulations do

not in fact mandate a "substantial evidence" burden of proof, the "substantive predicate" for a liberty interest is not the quantum of proof required, but the requirement of a finding of guilt based on evidence. That is the "substantive predicate" which limits official discretion, by dictating that a prisoner not be determined guilty of serious misconduct, or punished therefor, absent such a determination. See infra section II.B.2.

1. **Hawaii's Attorney General Interpreted the Regulation Just As the Ninth Circuit Interpreted It**

In petitioning this Court for review of the Ninth Circuit decision, the Attorney General of Hawaii framed the question presented as whether an inmate has a liberty interest in avoiding disciplinary segregation "solely because state prison disciplinary rules require a disciplinary committee to find substantial evidence of a rule infraction before deciding whether and to what extent the inmate should be segregated[.]" (Cert. Pet. at i) (emphasis added). Thereafter,

in her Brief on the merits, Petitioner suggested an interpretation of the regulation not made in the proceedings below and inconsistent with the characterization of the regulation adopted in Petitioner's initial brief. Continuing to concede that "the rules require the committee to find 'substantial evidence' before deciding, under the compulsion of the adjustment process, whether and to what extent to order an inmate segregated," (Pet'r Br. at 40-41), Petitioner now asserts that nevertheless "the rules permit the committee to convict, in its discretion (and to order disciplinary segregation), on the basis of any proof at all, so long as the disciplinary action is 'based upon more than mere silence.'" (Pet'r Br. at 41.)

The State's Attorney General in these proceedings has interpreted the regulation to require a finding based on substantial evidence of misconduct as a prerequisite to punishment by way of solitary confinement, as did the Ninth Circuit. Surely prisoners reading the regula-

tions could not be expected to put a finer gloss on them. Consequently, the regulations give prisoners a "reasonable expectation" that they will not be punished with disciplinary segregation absent a determination on "substantial evidence" of misconduct.

2. The Substantive Predicate Is a Finding Of Guilt Based on Evidence of a Specific Rule Violation.

Even if Petitioner's reading of the provision in question were correct, and Hawaii regulations did not mandate freedom from disciplinary segregation absent substantial evidence of guilt, the court of appeals correctly found that under the Thompson test the State of Hawaii created a protected liberty interest by placing substantive limitations on official discretion. Even if the burden of proof is not "substantial evidence," the regulations in any event mandate that punishment for serious misconduct, such as segregation for longer than four hours, must be based on evidence, other than the prisoner's silence in the face of the charges. While the

regulations provide that silence in face of the charge of misconduct "may be used as a permissible inference of guilt," Haw. Admin. R. § 17-201-17(c), disciplinary action "shall be based upon more than mere silence." Haw. Admin. R. § 17-201-18(b). See also Haw. Admin. R. §17-201-17 (b)(2). Petitioner characterizes this as the "most minimal of requirements," (Pet'r Br. at 41), but the fact remains that it is a requirement of evidence. In the absence of such evidence, a finding of serious misconduct and punishment by way of disciplinary segregation is precluded. It is this limitation on official discretion, and not any particular "burden of proof," that constitutes the "substantive predicate" of the liberty interest. The issue of whether "substantial evidence" is mandated as the exclusive standard for determinations of guilt is a red herring.

Hawaii's regulations treat determinations of, and punishment for, serious misconduct, in a manner fundamentally unlike other administrative

actions in the day-to-day running of the prison, such as classification and placement in a facility (Haw. Admin. R. § 17-201-1), transfers within or without the facility (Haw. Admin. R. § 17-201-22), administrative segregation (Haw. Admin. R. § 17-201-22), and involuntary protective custody (Haw. Admin. R. § 17-201-23), even though these actions may as a practical matter substantially curtail a prisoner's liberty.

In administrative matters, Hawaii's regulations prescribe no limits on official action; they leave prison officials to make their decisions based entirely upon subjective considerations and administrative convenience. Administrative segregation, which the regulations characterize as "nonpunitive in nature," Haw. Admin. R. § 17-201-24, may be imposed "whenever the facility administrator or a designated representative determines that an inmate or ward has committed or threatens to commit a serious infraction[,]" or that the inmate is a "threat"

to life or limb, the security or good governance of the facility or the community, or "whenever any similarly justifiable reasons exist." Haw. Admin. R. § 17-201-22. No standards or procedures are prescribed, other than the provision that "within a reasonable period of time," the inmate "should" be given a written summary of the reasons for administrative segregation, and "an opportunity to present evidence in defense[,]" but only "when permitting the inmate or ward to do so will not be unduly hazardous to institutional safety or correctional goals." Haw. Admin. R. § 17-201-24.

In contrast, the regulations relating to determinations of and punishment for misconduct dictate that decisions be made upon consideration of case-specific evidence and findings based on that evidence. Thus, the regulations provide that serious misconduct, which subjects the inmate to serious penalties such as segregation for longer than four hours, "shall be punished through the adjustment committee pursuant

to the procedures in sections 17-201-13 to 17-201-20." Haw. Admin. R. §17-201-12. A plea of not guilty to charges of serious misconduct "necessitates the consideration of evidence against the inmate or ward." Haw. Admin. R. § 17-201-17(b)(2). A finding of guilt "shall be made" where the inmate admits the violation or pleads guilty, or the charge is supported by substantial evidence, and disciplinary action "shall be based upon more than mere silence." Haw. Admin. R. § 17-201-18(b).¹⁰

¹⁰ A determination of guilt of a rule infraction, like a parole revocation decision, involves "a wholly retrospective factual question[.]" Morrissey v. Brewer, 408 U.S. 471, 479 (1972). A decision to confine a prisoner in administrative segregation, on the other hand, like a prison transfer or a parole release decision, depends on "purely subjective appraisals" or "informed predictions as to what would best serve [correctional purposes] or the safety and welfare of the inmate;" in these circumstances, "there is no set of facts which, if shown, mandate a decision favorable to the individual." See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 441 U.S. 1, 10 (1979) (quoting Meachum, 437 U.S. at 235). In Hawaii, as in all other jurisdictions, a determination of guilt of a specific rule violation involving serious misconduct cannot involve "purely subjective appraisals" or "informed predictions as to what would best serve

This is "relevant mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whether an inmate may be deprived of the particular interest in question." Thompson, 490 U.S. at 463 n.4. This language, which is compulsory in character, requires prison officials, before punishing an inmate for serious misconduct by solitary confinement, to consider evidence and make a finding of guilt based on the evidence. A prisoner can reasonably expect that he will not be placed in disciplinary segregation for more than four hours absent a finding of guilt of misconduct based on the evidence.

In addition, the rules specify a number of procedural safeguards in language unmistakably mandatory in character. The inmate "shall be served with written notice" of the hearing," including notice of the specific charges, and

correctional purposes." Rather, such determinations involve a hearing in which a set of facts may be shown which would "mandate a decision favorable to the individual."

"shall have the opportunity to review all relevant non-confidential reports [of] misconduct or a summary of the details thereof" prior to the hearing Haw. Admin. R. § 17-201-17(c). At the hearing, the committee "shall explain the reason for the hearing and the nature of the charge or charges," Haw. Admin. R. § 17-201-17(b), and the inmate "shall be given an opportunity to respond to the evidence," explain the alleged misconduct, or offer evidence in mitigation. Haw. Admin. R. § 17-201-17(f). The inmate "has a right to be apprised of the findings of the adjustment committee, Haw. Admin. R. § 17-201-18(a), and the inmate "shall be given a brief written summary of the committee's findings which shall be entered in the case file." The findings "will briefly set forth the evidence relied upon and the reasons for the action taken." If "necessitated by personal or institutional safety and goals," the findings may exclude certain items of evidence, but in that case "the fact that evidence has been omitted

and the reason or reasons therefor must be set forth in the findings." Haw. Admin. R. § 17-201-18(c). These provisions supply an additional "substantive predicate," precluding a determination of guilt and punishment unless certain procedures are followed in considering that evidence, procedures which are required in language comparably "mandatory" to the language under consideration in Hewitt. See 459 U.S. at 470 n.6. These rules give rise to a reasonable expectation on the part of inmates that they are enforceable against prison officials, and that a determination of and punishment for serious misconduct will be made only in conformity with them.

C. The Facility Administrator's Discretion to Review and Modify Committee Findings and Decisions Does Not Prevent the Creation of a Liberty Interest

Petitioner also asserts that no liberty interest is created by the limits these regulations place on the adjustment committee because the regulations grant the facility administrator

the discretion, under Haw. Admin. R. § 17-201-20(b), to review and modify adjustment committee findings or decisions. (Pet'r Br. at 41-43.) Petitioner argues that the regulation leaves the facility administrator with "unfettered discretion" to overturn committee decisions to dismiss misconduct charges. Committee decisions are thus only "advisory"; and "therefore an inmate can have no expectation of 'acquittal' if there is neither 'substantial evidence' of misconduct nor a confession." Id. Petitioner argues that, accordingly, this case is "on all fours with Olim v. Wakinekona, 461 U.S. 238 (1983)." (Pet'r Br. at 42.)

This is a strained reading of the regulations themselves, and of the Court's decisions that mandatory language placing substantive limitations on official discretion create a liberty interest. The committee's function is not a merely "advisory" one under the regulations. The regulations provide that serious misconduct "shall be punished through the ad-

justment committee pursuant to the procedures in sections 17-201-13 to 17-201-20." Haw. Admin. R. § 17-201-12. It is the committee that is authorized to function as the primary fact-finding and sentencing body; the administrator has no authority to make determinations of guilt or punishment in the first instance, but is empowered only to review and modify. Haw. Admin. R. § 17-201-20(b).

The regulatory framework in this case is thus entirely different from the one under consideration in Olim. In Olim, the Court explicitly found that the disciplinary committee made "recommendations to the Administrator, who then decides what action to take." Olim, 461 U.S. at 242. Nothing in the Hawaii regulation suggests that the committee's findings are merely "recommendations", or that the facility administrator, in exercising discretion to review and modify committee findings and decisions, is freed from the limits placed on the committee's authority to make determination of

guilt and punishment. Indeed, the facility administrator can hardly be considered the decisionmaker since in this case his review took place over eight months after the Adjustment Committee issued its disposition of the charges and over seven months after Conner had completed the disciplinary segregation ordered by the committee. In contrast, in Olim, the prisoner was not transferred until after the Administrator reached a decision, which was consistent with a procedure calling for decisions to be made by the Administrator after a recommendation by the Committee.

III. THE COURT SHOULD NOT DISTURB THE LAW REGARDING STATE-CREATED LIBERTY INTERESTS

Amicus Curiae Criminal Justice Legal Foundation (CJLF) urges this Court to jettison "the whole notion of state-created liberty interests" in connection with arbitrary punishment. (CJLF

Amicus Brief at 14.)" This radical suggestion,

" The Amicus Brief of the Criminal Justice Legal Foundation states that "excessive prisoner litigation detracts from the ability of the state to properly punish crime and protect the law abiding public." (CJLF Amicus Br. at 2). CJLF claims that "Prisoner civil rights cases filed in federal courts by state prisoners multiplied fivefold in 16 years, a much faster increase than the growth of the prison population." Br. at 2. CJLF cites to the U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Statistics 1993, pp. 550, 600. There are at least three problems with this claim. First, the cited source includes data on court filings from 1977 through 1993 (a sixteen year period), but includes population data only through 1992. Id. at 600. Second, CJLF's claim relates to petitions filed by state prisoners, id. at 550, while the population data cited refer to state and federal prisoners, id. at 600. Finally, even the data cited do not support CJLF's conclusion: state prisoners filed 78,752 civil rights petitions in federal court in 1977 and 33,018 petitions in 1993, reflecting a 4.26 times increase, rather than a fivefold increase. Id. at 550.

If one corrects for these problems, it transpires that in the last fifteen years the increase in civil rights filings has not significantly outpaced the increase in the prison population and, indeed, in the last ten years, there has actually been a per capita decrease in civil rights filings. State and federal prisoner filed 8,235 civil rights petitions in federal court in 1977; and 30,556 petitions in 1992, reflecting a 3.7 fold increase. Id. at 550. Over the same time period, the number of state and federal sentenced prisoners grew from 278,141 in 1977 to 847,271 in 1992, reflecting a threefold

if adopted, would unsettle the law and result in a flood of new litigation. In the twenty years since Wolff, all prison systems have developed procedures for compliance with Wolff with regard to the imposition of disciplinary segregation; an extensive body of case law has been developed in the lower courts, evaluating the adequacy of those procedures under Wolff. There is neither necessity nor justification for throwing that extensive framework of state law, regulation and judicial precedent into uncertainty.

Amicus CJLF concedes that, under Wolff, prisoners have a liberty interest in not being deprived of good-time credits without due process protection. (See CJLF Amicus Br. at 15.) Many jurisdictions, however, like Nebraska in Wolff, have but one system for the imposition of

increase. Id. at 600. In the last ten years, civil rights filings increased from 17,575 in 1982 to 30,556 in 1992, reflecting a 1.7 fold increase. Id. at 550. During the same time period, the number of state and federal sentenced prisoners increased from 394,374 in 1982 to 847,271 in 1992, reflecting a 2.15 fold increase. Id. at 600.

punishment for serious prison misconduct, and the range of potential punishments includes both the loss of good time and the imposition of disciplinary segregation. A ruling by this Court that prisoners have a liberty interest in the retention of good-time credits, but not in the avoidance of disciplinary segregation, would confuse prison administrators and prisoners, and in the process generate an explosion of litigation.

The Amicus' primary rationale for overturning settled law regarding state-created liberty interests is an assertion that "the Due Process Clause must not be used to straitjacket efforts to protect inmates from each other." (CJLF Amicus Br. at 5.) Implicit in this argument is the premise that in order to maintain security prison administrators require arbitrary power to impose punishment. The history of American prisons demonstrates the fallacy of that claim. In fact, in the era when prison administrators had essentially untrammelled power, many prisons

were characterized by "rampant violence" as well as an utter "lack of professionalism on the part of security personnel." Hutto v. Finney, 437 U.S. 678, 687 (1978); see also Rhodes v. Chapman, 452 U.S. 337, 354-361 (1981) (Brennan, J., concurring).

Many observers have chronicled the effect of court intervention in promoting the development of a professional correctional staff. It is now the case that

the operations of prisons and jails throughout the country are ... governed by an amalgam of statutes, regulations, and guidelines and are subject to greater accountability. Indeed, since the 1960's the principles of organizational rationality and legality have merged to structure the governance of the entire operational life of institutions and systems. One consequence is that the rule of law has not only penetrated these institutions; it has contributed to the professionalization of the administration of these institutions These changes far exceed the sum of the particulars in any set of court orders.

Malcolm M. Feeley & Roger A. Hanson, The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the

Literature, in Courts, Corrections and the Constitution 12, 26 (Di Iulio ed. 1990).

This "professionalization" of staff promotes rather than undermines a safe and orderly environment. While there have been some complaints of a short-term rise in violence while court reforms are being actively resisted by the old guard, the long-term results have been the promotion of safer and better-run prisons. See, e.g., Ben M. Crouch & James W. Marquart, Ruiz: Intervention and Emergent Order in Texas Prisons, in Courts, Corrections and the Constitution, supra 94-114. Indeed, the Federal Bureau of Prisons, which was among the first of the correctional systems to become "professionalized," has traditionally been considered one of the safest and most controlled. David Fogel, Let's Nationalize the State Prisons, in Prisoners and the Law 19-3, 19-6 (Robbins ed., 1972). Accordingly, there is no penal necessity for the radical change Amicus CJLF proposes.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

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